No. 87-1530

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

EASTERN PUBLISHING AND ADVERTISING, INC.,
(A Close Corporation) T/A "ARMED FORCES NEWS",

Petitioner,

V.

CHESAPEAKE PUBLISHING AND ADVERTISING, INC.,
(A Close Corporation) T/A "THE MILITARY NEWS";
KAREN A. HORN; KIMBERLY J. HORN;
CAROL WHITNEY ANSELL; DELLA LEMMINGS;
ALFRED E. CLASING, III;
RAYMOND J. CANNOLES; AND LOUISE MARTINS,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals For
The Fourth Circuit

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Counsel for Petitioner

QUESTIONS PRESENTED

1. Upon discovery by Petitioner, that two issues of its military and veterans newspaper had been wrongfully photocopied and assembled by Respondents into an infringing paper under Respondents name, and that statutory notice was required but omitted from them, may the Court of Appeals, sua sponte require Petitioner to maintain continuous cloned production of those papers in order to bring and maintain those federal copyright infringement claims although Petitioner has otherwise complied with all statutory copyright registration and legislative requirements excusing such innocent omission?

2. May a federal court impose its own additional judicial non-statutory element upon the copyright infringement claims of Petitioner contrary to expressed Congressional intent as is

specifically stated in conjunction with the 1976 enactment of the present federal copyright statute without violating the separation of powers doctrine?

3. Did the Complaint and supporting documents state a cause of action in each count sufficient to withstand a Rule 12(b)(6) Motion to Dismiss?

4. Did the court of Appeals as well as the District Court err, in their procedural case by case analysis of the civil R.I.C.O. claims here (18, USC, ss 1961 et seq), when it was determined by them that Petitioner's complaint failed to allege a sufficient "pattern" of racketeering activity so as to survive Respondents' F.R.C.P., 12(b)(6) motion to dismiss for failure to state a claim?

5. Were the District Court and the Court of Appeals required to deem

the factual allegations of Petitioner's complaint to be true for purposes of Respondents' F.R.C.P. 12(b)(6) motion to dismiss prior to any answering pleading being filed?

6. Is the proper scope of review of Petitioner's complaint upon Defendant's motion to dismiss under F.R.C.P. (12(b)(6), such that it must be determined by the Court that no relief could be granted under any set of facts that could be proven consistent with the allegations?

RULE 21.8 LIST AND

PARTIES TO THE PROCEEDINGS

Petitioner, EASTERN PUBLISHING AND ADVERTISING, INC.,[1] (Eastern) is incorporated and exists under the laws of Maryland. Eastern, for a number of years, has been engaged in the creation, printing and public distribution of several newspapers, one of which is an advertising supported military and veterans newspaper titled "ARMED FORCES NEWS."

Respondent, CHESAPEAKE PUBLISHING AND ADVERTISING, INC.,[2] (Chesapeake) is newly incorporated and exists under the

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[1] Eastern Publishing and Advertising, Inc. is chartered in Maryland (as a Close Corporation) and has no publicly traded stocks nor parent, subsidiary or affiliate corporations to list pursuant to Rule 28.1.

[2] Chesapeake Publishing and Advertising, Inc., is chartered in Maryland (as a Close Corporation) and also has no publicly traded stock or a parent, subsidiary or affiliates to list pursuant to that Rule.

laws of Maryland. Eastern was created by Petitioner's departing employees shortly before suit was filed below. Using Petitioner's customer records, materials and other items, they took upon leaving Petitioner, they commenced to print and distribute several publications photocopied from Petitioner's newspaper. One of them is titled "THE MILITARY NEWS."

Respondents Karen Horn, Kimberly Horn (her sister) Carol Ansell and Della Lemmings were engaged in rendering services to Eastern until they terminated that relationship to openly use Petitioner's property and to render those services to Chesapeake which was created by them.

Respondents Alfred Clasing, Raymond Cannoles, and Louise Martins operate and conduct a law office in which some of the other Respondents engaged their

services and at which the Respondent Chesapeake was legally formed, filed and started its publishing business.

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No. _____

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EASTERN PUBLISHING AND ADVERTISING, INC., (A Close Corporation) T/A "ARMED FORCES NEWS",

Petitioner,

V.

CHESAPEAKE PUBLISHING AND ADVERTISING INC., (A Close Corporation) T/A "THE MILITARY NEWS"; KAREN A HORN; KIMBERLY J. HORN; CAROL WHITNEY ANSELL; DELLA LEMMINGS; ALFRED E. CLASING, III; RAYMOND J. CANNOLES; AND LOUISE MARTINS,

Respondents.

Petitioner, Eastern Publishing and Advertising, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit rendered in these proceedings on October 16, 1987 with Petition For Rehearing and Suggestion for en banc hearing denied on November 19, 1987.

DECISIONS BELOW

The opinion of the District Court of Maryland entered on December 15, 1986 was not published but is set out in the Appendix. (App. pp. A-26)

The opinion of the United States Court of Appeals for the Fourth Circuit entered on October 16, 1987 is published at 831 F2d 488 and is set out in the Appendix. (App. pp. A-1)

The denial of rehearing en banc entered November 19, 1987 is not published. Copy of same also set out in the Appendix. (App. pp. A-22)

JURISDICTION

1. The opinion of the Court of Appeals was filed on October 16, 1987. The Order denying the Petition for Rehearing In Banc was filed on November

19, 1987. That Court's Mandate issued thereafter on November 27, 1987.

2. Jurisdiction is conferred upon this Court to review the decision of the Court of Appeals below by Writ of Cetiorari under 28 USC, ss 1254(1) timely proceeded upon under 28, USC, ss 2101(c).

STATUTES, RULES, AND PROVISIONS INVOLVED

The applicable provisions of Rule 12, F.R.C.P., as well as the federal Copyright Statute (17, USC, 101 et seq.) and Title 18, USC, are set forth in the Appendix hereto. (App. pp. A-39)

STATEMENT OF THE CASE

A. United States District Court, District of Maryland

This was a civil action filed in the District Court by Petitioner against

a newly formed competing newspaper and former employees for copyright infringement due to their direct unauthorized photocopying of two of plaintiff's newspapers and assembling substantial photocopied parts of them into a single paper and by replacing Petitioner's name on that paper with the infringing company's name and using that infringing paper to deceive plaintiff's own advertising customers and fraudulently obtain plaintiff's advertising renewal contracts through display of the infringing newspaper to Petitioner's own customers in Maryland, Northern Virginia and Washington, D.C. This first complaint was dismissed on motion under F.R.C.P. 12(b)(6) with leave to amend.

Also filed were a separate Affidavit, Exhibits, and a Motion for Temporary Restraining Order detailing multiple

fraudulent acts, infringements and taking and using of Petitioner's properties.

It was docketed as Civil No. JFM-86-1653 and styled Eastern Publishing and Advertising, Inc. v. Chesapeake Publishing and Advertising, Inc., et al.

On September 24, 1986 the plaintiff filed its five (5) count Amended Complaint.

Count one alleged Copyright Infringement upon those two (2) publications and set out their copyright registration numbers. Count two alleged statutory infringement damages. Count three alleged R.I.C.O. violation damages for mail fraud. Count four alleged R.I.C.O. violation damages for wire fraud. Count five is not at issue.

Both groups of defendants again filed Motions to Dismiss under Rule 12(b)(6) claiming that the amended

complaint counts also failed to state a claim upon which relief could be granted.

On December 15, 1986, without a hearing, Judge Motz issued his unpublished Memorandum Decision and Order Granting all defendants their Motions to Dismiss. Copy attached as appendix "D" herein. Dismissal of the infringement claims were erroneously based on no allegation of the publication of the infringed newspapers. The R.I.C.O. claims were dismissed for a lack of stating a pattern sufficient for racketeering activity.

A timely appeal was entered.

B. United States Court of Appeals, Fourth Circuit

On appeal it was docketed as No. 87-1520 styled Eastern Publishing and Advertising, Inc. v. Chesapeake Publishing and Advertising, Inc., et al.

The Court of Appeals affirmed the Rule 12(b)(6) dismissal of the Complaint by the District Court but based dismissal on a substantially different basis as to the copyright infringement claims.

The Court of Appeals, differing with the District Court, cited the complaint as having alleged facts showing the infringement, copying, and publishing by Defendants. But the court then determined, sua sponte, that, since the newspaper issues, infringed and lacking notice, were not being printed in continuous production at the time, then although statutorily permitted subsequent copyright registration was properly completed with intent of Petitioner to affix notice on all other copies that would be published in the future being stated, and being otherwise in compliance with 17 USC 405, those

acts of plaintiff still were not sufficient to permit the filing of an infringement suit. The Court of Appeals also affirmed the dismissal of the other claims on the same basis as given the District Court.

C. District Court Jurisdiction

Jurisdiction of the District Court was invoked pursuant to Title 28, USC, Sections 1331; 1391(b) and (c); 1338(a) and (b); and Section 1337(a). Jurisdiction of that court was further authorized pursuant to Title 18, USC, Section 2 and 1964(a) and (c).

D. Relevant R.I.C.O. Determinations

Judge Motz erroneously determined that the R.I.C.O. courts were lacking in alleging a pattern of racketeering activity.

Judge Motz determined that the complaint, as written, stated only a

"single alleged scheme." Citing, what he noted as a lack of guidance by the Fourth Circuit, he erroneously determined that a "pattern of racketeering activity" under 18, USC, Section 1961(5) and 1965 can only exist where two or more separate schemes are present. Judge Motz, in reviewing those many separate and continuous fraudulent transactions and taking of Petitioner's customers using several infringed publications and multiple separate but connected fraudulent acts determined them not to constitute a sufficient pattern of racketeering activity. (Appendix D, pp. A-33,37)

The Court of Appeals also affirmed the Rule 12(b)(6) dismissal of the racketeering counts and the Antitrust count upon the basis relied upon by Judge Motz. (Appendix A, pp. A-2)

REASONS FOR GRANTING THE WRIT

The copyright issue herein is of paramount importance in the field of federal copyright law. This decision presents a judicially created essential element, or a judicially created impediment upon those statutory elements created by Congress in the grant of copyright infringement protection to those who now innocently omit statutory notice but who then comply with the statutes mandates created by Congress prior to the filing of their infringement claims.

The literal application of this pre-suit mandatory element judicially imposed below, would result in requiring Petitioner to commence additional and continuous printing of the two copyright registered issues prior to filing of suit and maintain printing up to the ruling upon any Rule 12(b)(6) motion.

As far as Petitioner can determine and as noted by the Court of Appeals below, no other federal Court has been found to have imposed such a transparent requirement. Petitioner asserts that the decision by the Court of Appeals here is a judicial invasion of the legislative prerogative of Congress, and the Court, in its supervisory powers, is requested to reverse the decision of the Court of Appeals below.

This Court should likewise reverse the Court of Appeals decision respecting the substantial, non-statutory barrier erected to this Racketeering complaint in which the injured party now must apparently allege and prove more than one fraudulent racketeering scheme.

ARGUMENT

I. PETITIONER'S COPYRIGHT INFRINGEMENT CLAIMS WERE VALIDLY PRESENTED AND THE JUDICIALLY IMPOSED CONTINUOUS CLONED PRODUCTION ELEMENT WAS NOT MANDATED BY CONGRESS

Judge Motz determined that the copyright claim was insufficient.

He noted the lack of the printed notice of copyright on the original published copies of Petitioner's newspaper and the Petitioner's stated intent of placing of such notice on all future published and distributed copies.

Judge Motz, however, erroneously determined that Defendants had created a new copyrightable newspaper when the defendants;

> ". . . cut out certain portions of Plaintiff's protected works, re-positioned certain portions thereof [and] pasted these portions together...
> . . . took the cut out por-

> tions of Plaintiff's newspapers containing copyright protection and reassembled, retouched . . . and removed certain identifying words from it. Thus, according to Eastern itself, defendants have recompiled the compilation."

He found, in dismissing this count, that this process of unauthorized copying and reproduction in copies cannot be said to constitute copyright infringement. Judge Motz apparently did not consider 17 USC, 106(1), (2), (3) and (5).

On this basis the District Court erroneously dismissed the complaint and all counts thereof.

Thus the appeal to the Court of Appeals presented the sole issue, as to whether or not the complaint presented an allegation or fact sufficient to show "that Defendants have copied ... a compilation."

The Court of Appeals supported its affirmance of the dismissal by sua

sponte determining that the ss 405 statutory savings clauses are not available to anyone unless there is maintained a continuous production of cloned items.

When the Circuit Court found that continuous subsequent production of the same item was a necessary statutory ingredient, it failed to cite any other decision finding such a requirement. Our research likewise finds no other such decision. The Court must have disregarded the fact that law publishers as well as Congress has stated Congress' intent to the contrary. See for example Hurwitz, "Omission of Copyright Notice Under Section 405(a): What kind of Oxymoron Moron Makes A Deliberate Error?", 60 N.Y.U.L.J. 956.

The Circuit Court did note that, contrary to the holding by the District Court, that the allegations of infringe-

ment by unauthorized photocopying and subsequent printing and publishing existed in the complaint. Thus the District Court had in fact erred when it erroneously dismissed on that ground.

In enactment of the new federal copyright statute Congress spelled out congressional intent on the provisions of ss 401-405 very specifically. Thus, in the report of the 94th Congress, the House Committee on the Judiciary submitted its detailed report to the House with its statutory revamping amendment virtually rewriting (save for the title and introduction) the former Senate Bill. With some unimportant minor changes, this revision was enacted. The Committee report, approved by trade groups, artists, writers, and even the Deputy Copyright Registrar, supported the following expressed intent reprinted at 5, U.S. Code Cong. and Adm.

News (House Report and Joint Cong. Reports) 5659 et seq. as follows:

> "SECTION 405. OMISSION OF COPYRIGHT NOTICE
>
> Effect of omission on copyright protection
>
> The provisions of section 405(a) make clear that the notice requirements of section 401, 402, and 403 are not absolute and that, unlike the law now in effect, the outright omission of a copyright notice does not automatically forfeit protection and throw the work into the public domain. This not only represents a major change in the theoretical framework of American copyright law, but it also seems certain to have immediate practical consequences in a great many individual cases. Under the proposed law, a work published without any copyright notice will still be subject to statutory protection for at least 5 years, whether the omission was partial or total, unintentional or deliberate.
>
> Under the general scheme of the bill, statutory copyright protection is secured automatically when a work is created, and is not lost when the work is published, even if the copyright notice is omitted entirely. Subsection (a) of

section 405 provides that omission of notice, whether intentional or unintentional, does not invalidate the copyright if either of two conditions is met:

> (1) if 'no more than a relatively small number' of copies of phonorecords have been publicly distributed without notice; or (2) if registration for the work has already been made, or is made within 5 years after the publication without notice, and a reasonable effort is made to add notice to copies or phonorecords publicly distributed in the United States after the omission is discovered.

Thus, if notice is omitted from more than a relatively small number of copies or phonorecords, copyright is not lost immediately, but the work will go into the public domain if no effort is made to correct the error or if the work is not registered within 5 years.

Section 405(a) takes a middle-ground approach in an effort to encourage use of a copyright notice without causing unfair and unjustifiable forfeitures on technical grounds. Clause (1) provides

that, as a relatively small number of copies or phonorecords, there is no effect upon the copyright owner's rights except in case of an innocent infringement covered by section 405(b); there is no need for registration or for efforts to correct the error if this clause is applicable. The phrase 'relatively small number' is intended to be less restrictive than the phrase 'a particular copy or copies' now in section 21 of the present law.

Under clause (2) of subsection (a), the first condition for curing an omission from a larger number of copies is that registration be made before the end of 5 years from the defective publication. This registration may have been made before the omission took place or before the work had been published in any form and, since the reasons for the omission have no bearing on the validity of copyright, there would be no need for the application to refer to them. Some time limit for registration is essential and the 5-year period is reasonable and consistent with the period provided in section 410(c).

The second condition established by clause (2) is that the copyright owners made a 'reasonable effort,' after

discovering the error, to add the notice to copies or phonorecords distributed thereafter.

...

"SECTION 408 COPYRIGHT REGISTRATION IN GENERAL

Permissive registration

Under the section 408(a), registration of a claim to copyright to any work, whether published or unpublished, can be made voluntarily by 'the owner of copyright or of any exclusive right in the work' at any time during the copyright term. The claim may be registered in the Copyright Office by depositing the copies, phonorecords, or other material specified by subsection (b) and (c) together with an application and fee. Except where, under section 405(a), registration is made to preserve a copyright that would otherwise be invalidated because of omission of the notice, registration is not a condition of copyright protection." Pages 5768-63, 68

What the Court of Appeals did not seem to understand, however, is that the new copyright act removed the old act forfeiture provision. Inserted in its

place is current Sections 401, 404 (Notice required) 405 (Effect of Omission). The effect of omission now is that the copyright protection will only be invalidated when certain other actions are not timely taken.

Lack of notice now is not simply excused under Section 405(a) but actually the copyright is itself now statutorily validated, and as such it is just as enforceable by Petitioner as with notice subject only to Petition, or as it did here, carrying out Section 405(b) provisions.

These copyrights here are statutorily enforceable. See Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F2d 89 (CA-2, 1985) rejecting and overruling Shapiro & Sons, Bedspread Corp. v. Royal Mills Assoc., 568 F.Supp. 972, and Beacon Looms Inc. v. S. Lichtenberg & Co., 557 F.Supp. 1305,

Oboler v. Goldin, 714 F2d 211, 212 (CA2-1983), Nimmer, 2 Nimmer on Copyright, Section 7.13(b)(3) at 7-96, N.43, and reprint of House Committee Report, 1976 U.S. Code Cong. & Adm. News, 5659, 5762, 5763, 94th Cong. 2nd Sess. H. Rep. No. 1476, pp. 147.

To use, as Defendants below did, as a single source, prior protected materials or compilations, to directly copy any portion and use that copied material is infringement. It is not how much or how little is plagiarized but whether any is plagiarized. See Detective Comics, Inc. v. Bruns Publications, 111 F.2d 432, 433 (CA2); Gleistein v. Donaldson Litho Co., 188 US 239, 23 S.Ct. 299; Alfred Bell & Co. v. Catolda Fine Arts, 191 F.2d 99, Ricker v. General Electric Co., 162 F.2d 141.

II. Plaintiff's Allegations of R.I.C.O. Violations are Sufficient

A. Generally

In Sedima, S.P.R.I. v. Imrex Co., Inc. 473 U.S. 479 105 S.Ct. 3275 this Court specifically determined that the R.I.C.O. Act was to be "read broadly" and that neither a prior criminal conviction nor a "distinct racketeering injury" was necessary. It was determined that if a defendant engages in a "pattern of racketeering activity" as delineated and that racketeering activity harms plaintiff in his "business or property" the private claim arises.

This Court restated the term "racketeering activity" as being any act "chargeable" under certain generically described state laws, and any act "indictable" under state or federal provisions.

The Court approved the requirement that a pattern of racketeering activity be 2 or more acts of racketeering activity having the same or similar purposes, results, participants, victims or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events, citing 18, USC, 3575(e).

Thereafter the Court determined that in order "to state a claim" the plaintiff must of course allege each of these [3] elements." The Court stated those elements to be (1) conduct (2) of an enterprise (3) through a pattern [that as defined by the Court above] (4) of racketeering activity. The Court then determined "But the statutes require no more than this." 473 U.S. 490, 105 S.Ct., 3286. The Court thereupon cited U.S. V. Turkette, 452 U.S. 576, 586-7, 101 S.Ct. 2524,

2530-1, as revealing its reach into legitimate enterprise.

This Court also has decided American National Bank etc. v. Haroco, Inc., 473 U.S. 606 105 S.Ct. 3291 the same date (7/1/85). The lower Court had dismissed under F.R.C.P.(12(b)(6). It was held (per curiam) that injuries with or without damages is sufficient to state a claim.

That Court also found that this determination must be made by the Court upon applying "ordinary civil standards to pleadings."

B. The Pattern Allegations Are Sufficient

The trial Court below and the Court of Appeals affirmed on the basis, that the complaint alleged a single scheme of alleged racketeering activity with a single purpose and a single victim.

The statute, however, only requires, as here alleged, at least 2 separate acts of racketeering activity to constitute a pattern Sedima, S.P.R.L.. supra, 105 S.Ct. at 3285, n.14, not two separate racketeering schemes.

The Court of Appeals, however, relied upon the recent Fourth Circuit decision of International Data Bank v. Zepkin, 812 F2d 149 that, contrary to statute, a continuous fraudulent scheme of unlimited separate racketeering acts was not a sufficient pattern and all R.I.C.O. claims must be resolved upon a case by case basis.

III. PETITIONER'S FACTUAL ALLEGATIONS MUST BE DEEMED TRUE FOR PURPOSES OF THIS MOTION TO DISMISS

Given Defendant's Rule 12 motion to dismiss prior to service of their answer, all of the factual allegations

in plaintiff's Amended Complaint must be deemed true. See e.g. Hishon v. King & Spaulding, 467 U.S. 69, 104 S.Ct. 2229 (1984). That is, no relief could be granted under any set of facts that could be proven consistent with the allegations, Hishong, Supra. See Conley v. Gibson, 355 U.S. 41, 45-46, 78 American National Bank & Trust Co. v. Haroco, Inc., 473 U.S. 606, 105 S.Ct. 3291. This includes the exhibits annexed to the complaint, Goldman v. Belden, 754 F2d 1059 (2d Cir. 1985), and papers and the affidavit.

Thus, the court may not weigh the evidence before it, but must deny the motion unless plaintiff cannot recover to a legal certainty. Ryder Energy Dis. Corp. v. Merrill Lynch Commod., Inc., 748 F2d 774 (2d Cir. 1984). Accordingly, it is only the extraordinary case in which a dismissal is properly granted.

5 Wright & Miller, Federal Practice & Procedure, Section 1357.

See also Harper & Row Pub., Inc. v. Nation Enterprises, 471 US 539, 105 S.Ct. 2219, 2228-29 (1985). A certificate is prima facie evidence of the copyrights validity, Hasbro Bradley v. Sparkle Toys, 780 F2d at 192.

At this posture it was fundamentally wrong for the trial Court and the Court of Appeals to summarily dismiss under Rule 12(b)(6) all of the claims presented herein.

CONCLUSION

For the reasons advanced for the errors committed below it is respectfully requested that this Court grant certiorari and reverse the judgments below.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 87-1520

Eastern Publishing and Advertising, Inc., (A Close Corporation), t/a "Armed Forces News",

Plaintiff-Appellant,

v.

Chesapeake Publishing and Advertising, Inc., (A Close Corporation), t/a "The Military News"; Karen A. Horn; Kimberly J. Horn; Carol Whiteney Ansell; Della Lemmings; Alfred E. Clasing, III; Raymond J. Cannoles; Louise Martins,

Defendant-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA-86-1653-JFM)

Argued:
June 29, 1987

Decided:
October 16, 1987

Before PHILLIPS, ERVIN, and WILKINSON, Circuit Judges.

William Edward Seekford for Appellant; John Joseph Kuchno (Henry R. Lord; Piper & Marbury; Charles Martinez; Eccleston & Seidler on brief) for Appellees.

PHILLIPS, Circuit Judge:

Appellant Eastern Publishing and Advertising, Inc. (Eastern), appeals the Rule 12(b)(6) dismissal of its claims against a competing publisher, Chesapeake Publishing and Advertising, Inc. (Chesapeake), former Eastern employees, and former associates in the law firm that represents Eastern, alleging copyright infringement and R.I.C.O. and antitrust violations. We affirm the dismissal of the copyright claim because Eastern failed to attach the requisite notice to the advertisements and to the issues of its newspaper, "Armed Forces News," on which it claims copyrights. We also affirm dismissal of the civil R.I.C.O. and antitrust claims on the grounds relied upon by the district court.

I

Eastern publishes a quarterly newspaper, "Armed Froces News," which is

directed to military personnel and their dependents and which consists of original advertising and publicly available government press releases. Chesapeake publishes a competing newspaper, "The Military News." Claiming that its publication is entitled to copyright protection as a "compilation" under 17 U.S.C. ss 101,103, even though the government publications that make up the newspaper are not themselves copyrightable, 17 U.S.C. s 101, Eastern claimed that Chesapeake infringed its copyrights in two issues of the "Armed Forces News," Volume V, Number III and Volume VI, Number IV. Eastern also claimed that Chesapeake infringed valid copyrights in individual advertisements appearing in those same issues. Volume V, Number III first was published on March 22, 1986, and Volume VI, Number IV on March 27, 1986. Eastern registered

copyrights in these materials on May 9 and May 20, 1986, respectively. Copyright notices appeared on subsequent issues of the publication. No copyright notices appeared on the advertisements.

Appellees Karen Horn, Kimberly Horn, Carol Ansell, and Della Lemmings were employees of Eastern until April 1986. Appellees Alfred Clasing and Raymond Cannoles worked with the law firm retained by Eastern before formation of Chesapeake; appellee Louise Martins currently works with Clasing and Cannoles. Clasing, Cannoles, and Martin are Chesapeake directors, and Karen Horn is the company're resident agent. According to Eastern's complaint, the various named defendants were responsible for photocopying, cutting apart, and reassembling Volume V, Number III and Volume VI, Number IV of "Armed Forces News" to create and publish "The

Military News." Eastern further alleged that unidentified defendants represented to Eastern's advertising customers that Chesapeake was connected to Eastern and that the customers could renew their advertisements in Eastern's publication through Chesapeake. These customer contacts were alleged to have taken place through the mails and by inter-state wire and telephone transmissions on various occasions during March, April, and May 1986.

In addition to claiming that publication of "The Military News" infringed Eastern's copyrights, Eastern charged that Chesapeake's exploitation of its customers led to a decline in the number of "Armed Forces News" customers, while the number of Chesapeake's customers increased to the point that Chesapeake now controls the relevant market. Thus, according to Eastern, Chesapeake's

activities have injured competition in violation of federal antitrust laws, 15 U.S.C. ss 1-15. Eastern did not allege before the district court that any other competitor beside itself had been injured, but on appeal Eastern submits that at least three other competitors exist and that at least one of these has been injured competitively. Finally, Eastern charged Chesapeake with civil R.I.C.O. violations for having committed multiple acts of mail and wire fraud in misleading Eastern's customers into publishing advertisements in "The Military News."

In ruling on appellees' 12(b)(6) motion, the district court found: (1) there was no copyright infringement because defendant's publication amounted to a recompilation of the copyrighted issues of "Armed Forces News"; (2) there was no "pattern" of racketeering

activity to support the R.I.C.O. claim; and (3) the facts alleged did not demonstrate the injury to competition required for an antitrust claim.

This appeal followed.

II

Eastern claims copyright in two separate sets of material: (1) advertisements published in "Armed Forces News"; and (2) particular issues of the newspaper, Volume V, Number III and Volume VI, Number IV. To succeed on a copyright claim, one asserting copyright protection must have registered the copyright, 17 U.S.C. s 411(A); Conan Properties, Inc. v. Mattel, Inc., 601 F. Supp. 1179, 1182 (S.D.N.Y. 1984). International Trade Management, Inc. v. United States, 553 F. Supp. 402 (Ct. Cl. 1982), and must also have attached notice of copyright on all publicly distributed copies of the protected item. 17 U.S.C. s 401(a); e.g., M.

Kramer Manufacturing Co. v. Andrews, 783 F2d 421, 443 (4th Cir. 1986).

No notice appeared on the individual advertisements. 17 U.S.C. s 404(a) permits a copyright notice on a compilation of work as a whole to cover individual parts of the whole, unless the individual part is an advertisement for the benefit of someone other than the holder of the copyright in the entire collective work. A newspaper claiming copyright ownership in an advertisement prepared for another must give specific and separate notice of its copyright in the advertisement. See Canfield v. Ponchotoula Times, 759 F2d 493 (5th Cir. 1985). Therefore, even if notice of copyright was affixed properly to the newspaper to cover the publication as a whole, that notice would not cover the individual advertisements, and there can be no copyright infringement as to them.

There also was no notice on the two issues of "Armed Forces News" for which copyrights were registered on May 9 and May 20, 1986. Assuming these issues were copyrightable as "compilations," which are selections or arrangements of even uncopyrightable material in an original way, see Southern Bell Telephone and Telegraph Co. v. Associated Telephone Director Publishers, 756 F2d 801, 809 (11th Cir. 1985), the registered copyrights lend no protection to Eastern unless the failure to place notice upon them is excused under 17 U.S.C. s 405(a). Section 405(a)(2) excuses omission of notice if

> registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered.

Eastern, having registered copyrights in

the March 22 and March 27 issues on May 9 and May 20, and having placed general copyright notices on subsequent issues of the "Armed Forces News," claims that its copyright is preserved by the s 405(a)(2) excuse.

The District Court declined, in dictum, to excuse the failure to give notice under s 405(s)(2) because it believed this section of the Copyright Act "is most clearly applicable to products identical to one another which are in continuous production," citing Original Appalachian Artworks, Inc. v. Toy Loft, 684 F2d 821, 826-27 (11th Cir. 1982) (dolls); Shapiro & Son Bedspread Corp. v. Royal Mills Associates, 568 F. Supp. 972, 976-77 (S.D.N.Y. 1983) (bedspreads); Beacon Looms, Inc. v. S. Lichtenberg & Co., 552 F. Supp. 1305 (S.D.N.Y. 1982) (curtains); but cf. Canfield, 759 F2d 493 (considering the s

405(a)(2) exception in a case involving newspapers). Our research reveals only one case in which s 405(a)(2) has been invoked to preserve copyright protection for an article that is not in constant production, Werlin v. The Reader's Digest Association, 528 F. Supp. 451, 461 (S.D.N.Y. 1981), and we decline to follow its lead on the fact of this case. We therefore agree with the District Court that s 405(a)(2) does not apply unless there is continuous production of identical products, and for reasons that follow, we think that was not shown here.

Here, Eastern has claimed a copyright in two specific issues of its publication, each of which necessarily had not only a limited period of distribution but also a very limited lifespan in the hands of a consumer. Subsequent notice placed upon later,

different issues of "Armed Forces News" is ineffective to alert others that copyrights cover earlier issues. It is also impossible for Eastern to attach notice to the issues in question and thereby to comply literally with the second prong of s 405(a)(2).

Cases considering the related question whether one claiming protection under s 405(a)(2) must place notices of copyright on products already distributed to customers or only on products still in the hands of a retail seller support this conclusion. See e.g., M. Kramer, 783 F2d at 444; Donald Frederick Evans and Associates, Inc. v. Contiental Homes, 785 F2d 897, 911 n.22 (11th Cir. 1986). Whatever their particular conclusions, these causes, like those construing the "reasonable effort" required by s 405(a)(2), proceed on the premise that products protectible under

s 405(a)(2) must have continued distribution, at least from a retailer, as well as continued use in the hands of a consumer or retailer. That simply is not the case with respect to the discrete issues of newspapers for which protection is sought here. These products obviously do not have those essential aspects.

Because the savings provision of s 405(a)(2) does not apply here, Eastern's failure to give notice is not excused, and the two publications of "Armed Forces News" do not merit copyright protection.

III

We also agree with the District Court's dismissal of Eastern's civil R.I.C.O. claim. The essential elements of this type of R.I.C.O. claim are: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). The racketeering activities upon which Eastern's claim is based are mail and wire fraud allegedly committed when appellees solicited appellant's advertising customers, misrepresentating that they were working on behalf of the "Armed Forces News." The district court found that these instances of mail and wire fraud did not establish the requisite "pattern" for a successful R.I.C.O. claim.

We think decision here is controlled by our intepretation and application of the "pattern" requirement in International Data Bank, Ltd. v. Zepkin, 812 F2d 149 (4th Cir. 1987). In that case, drawing on the Supreme Court's recognition in Sedima, 473 U.S. 479, that more careful adherence by the courts to this requirement might properly limit civil R.I.C.O. claims to

their proper scope, we concluded that "no mechanical test can determine the existence of a R.I.C.O. pattern," and that the question is necessarily a "matter of criminal dimension and degree" to be decided on a case-by-case basis. Zepkin, 812 F2d at 155. The touchstone for assessing this we thought was revealed by the legislative history's emphasis that what was targeted was "not sporadic activity" but continuity or the threat of continuity of racketeering activity. Id. at 154. On this basis, we concluded that as a general proposition "a single, limited fraudulent scheme," notwithstanding it might include the requisite minimal number of sufficiently related predicate acts would not constitute the "pattern" of racketeering activity contemplated by Congress. Id. Such a single, limited scheme we thought was not the kind of

"ongoing unlawful activities whose scope and persistence pose a special threat to social well-being." Id. While we recognized that a scheme properly considered to be a "single" one might by virtue of its very size and continuity meet the test, we thought the typical fraudulent schemes, limited in occurrence, in scope, and in purpose, that have been the traditional subjects of state tort law were not intended to be swept into R.I.C.O's reach by Congress. Id.

On this basis we concluded that a R.I.C.O. complaint by investors alleging as predicate acts two violations of the securities laws in connection with the sale of securities did not sufficiently allege a pattern of R.I.C.O. activity. We held that the conduct charged was instead merely that of a "single, limited scheme" to defraud. Though

it met the technical requirements of a sufficient number of predicate acts sufficiently related to each other, it failed to charge the kind and degree of continuous engagement in criminal conduct required to constitute a R.I.C.O. "pattern."

We think exactly the same analysis applies to the conduct charged here. The predicate mail and wire fraud acts charged are sufficient in number. They are sufficiently related in allegedly furthering Chesapeake's efforts to gain a competitive edge over Eastern. But in the end all that results is a single, non-recurring scheme to defraud a single entity by taking unfair competitive advantage in a quite narrow business context. There is no inference that the scheme embodies a threat of continued like activity in the future. Just as the scheme alleged in Zepkin was found

wanting in the required degree of continuity of conduct, so is that here. The complaint fails to allege a R.I.C.O. pattern of racketeering activity. See Medallion TV Enterprises v. SELECTV of California, Inc., 627 F. Supp. 1290, 1296-97 (C.D. Cal. 1986) (series of calls and letters over a two-month period constitutes a single criminal episode, not a "pattern of activity"); Phelps v. Wichita Eagle-Beacon, 632 F.Supp. 1164, 1171-72 (D. Kan. 1986) (several telephone conversations and mailings in furtherance of single ongoing scheme to harm plaintiff not a R.I.C.O. "pattern"); Grant v. Union Bank, 629 F. Supp. 570, 578 (D. Utah 1986) (multiple mail and wire conviction in furtherance of single fraudulent loan scheme not a R.I.C.O. pattern); cf. Temporaries, Inc. v. Maryland National Bank, 638 F. Supp. 118 (D. Md. 1986)

(recognizing that single open-ended scheme might be so extensive in potential scope as to constitute pattern); see also HMK Corp. v. Walsey, ___ F2d ___, No. 86-3582 (4th Cir. Sept. 17, 1987) (applying Zepkin to find no pattern in single scheme extending over long period and involving many predicate acts aimed at corrupting political processes to gain competitive advantage).

IV

Eastern's antitrust claim is based upon the defendants' acts of copyright infringement and appropriation of confidential business information. The district court held this not to be the type of conduct at which the antitrust laws are aimed, and we agree. See Bunker Ramo Corp. v. United Business Forms, Inc., 713 F2d 1271, 1283 (7th Cir. 1983). Moreover, the antitrust

laws are inapposite here because the only damage is to Eastern as a competitor; there is no alleged injury to competition in the relevant market. See id., at 1284-85; Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). Eastern complains on appeal that in finding no injury to competition, the district court erroneously believes that there were no competitors in the market other than Eastern and Chesapeake. The court noted that before the creation of Chesapeake, there was only one market entity, Eastern, and that if events transpire as Eastern predicts, there will only be one market entity, Chesapeake. Therefore, there was no injury to competition. Eastern now avers for the first time that there are other competitors who are also harmed by Chesapeake's activities. We decline to take into account these other

alleged competitors because their existence and injury were not averred in the complaint nor in any way suggested to the district court.

AFFIRMED.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-1520

Eastern Publishing and
Advertising, Inc., etc.,

Appellant,

versus

Chesapeake Publishing and
Advertising, Inc., etc., et al,

Appellees.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

O R D E R

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that leave to file the petition for rehearing out of time is granted and the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Ervin and Judge Wilkinson.

For the Court,

/s/ John M. Greacen

CLERK

Appendix C

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

November 27, 1987

TO: U.S. District Court for the
District of Maryland at Baltimore

RE: 87-5120 Eastern Publishing v.
Chesapeake Publish
CA-86-1653-JFM

HEREWITH IS THE MANDATE OF THIS COURT IN THE ABOVE-ENTITLED APPEAL. The certified judgment and original record on appeal are returned ONLY to the district court/agency.

Enclosures:

__X__ Opinion and Certified copy of the judgment

__X__ Bill of costs form

__X__ Original record on appeal consisting of

__2__ Volumes of pleadings

__1__ Volumes of transcripts

____ Volumes of exhibits

____ Volumes other

__3__ TOTAL VOLUMES

____ The record will be returned at a later date.

____ The record was never transmitted by the D/Ct.

____ Other _____

Please acknowledge receipt of these documents on the enclosed copy of this notice.

JOHN M. GREACEN, Clerk

By:_____
E. Marshall Buckles
Deputy Clerk

Copies of this notice forwarded to:

William Edward Seekford, Esq.
Henry Robbins Lord, Esq.
John Joseph Kuchno, Esq.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EASTERN PUBLISHING AND ADVERTISING, INC.	*	
V.	*	Civil No. JFM-86-1653
CHESAPEAKE PUBLISHING AND ADVERTISING, INC.	*	

****

MEMORANDUM

Eastern Publishing and Advertising, Inc. has brought this action against persons formerly associated with it and against a new company, Chesapeake Publishing and Advertising, Inc., which these persons formed. Eastern publishes "Armed Forces News," a quarterly newspaper consisting of original advertising and publicly available government press releases. Defendants now publish a competing newspaper called "The Military News."

Eastern's original complaint contains claims for copyright infringe-

ment, willful copyright infringement, RICO violations, anti-trust violations, fraud, and unfair competition. After a hearing, this Court granted motions to dismiss filed by defendants as to the original complaint and granted plaintiff leave of Court to file an amended complaint. An amended complaint has now been filed which, except for the deletion of the fraud claim, is substantially identical to the original complaint. Defendants have renewed their motions to dismiss.

There is no diversity of citizenship between the parties and the only asserted basis for the subject matter jurisdiction of this Court is its federal question jurisdiction over the copyright, RICO and anti-trust claims. Since the Court finds that plaintiff has not stated any claim for relief on these federal claims, it will decline to

exercise its pendent jurisdiction over whatever state law claims plaintiff may be asserting and will not reach the legal issues raised by those claims.

Copyright infringement Claims.

Section 411(a) of Title 17 of the United States Code provides that "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title." In the amended complaint plaintiff has identified only two issues of the Armed Forces News which have been properly registered. Accordingly, plaintiff's copyright claims are limited to those two issues. See, e.g., Conan Properties, Inc. v. Mattel, Inc., 601 F.Supp. 1179, 1182 (S.D.N.Y. 1984); International Trade Management, Inc. v. United States, 553 F.Supp. 402 (Ct. Cl. 1982).

Eastern alleges that the two issues in question contain two types of copyrighted material: original advertising and a compilation of government publications (which are not themselves copyrightable). Eastern has never - either at the time of the original publication or since - placed notices of copyright upon the individual advertisements. Its failure to do so bars it from asserting that its copyrights for those advertisements have been infringed. See Canfield v. Ponchatoula Times, 759 F2d 593 (5th Cir. 1985).

The two issues in question likewise did not include notices of copyright. Eastern has placed copyright notices on subsequent issues and argues that the lack of notice on the prior ones is therefore excused under 17 U.S.C. section 405(a)(2). Section 405(a)(2)

provides that omission of the copyright notice does not invalidate the copyright if "registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonograph records that are distributed to the public in the United States after the omission has been discovered." This section is most clearly applicable to products identical to one another which are in continuous production. See e.g., Original Appalachian Art Works, Inc. v. Toy Loft, 684 F2d 821, 826-27 (11th Cir. 1982) (dolls); Shapiro & Son Bedspread Corp. v. Royal Mills, 568 F.Supp. 972, 976-77 (S.D.N.Y. 1983) (bedspreads); Beacon Looms, Inc. v. S. Lichtenberg &

Eastern also argues in its memorandum opposing defendants' motions to dismiss that section 405(a)(1) applies. However, the amended complaint alleges no facts to support that conclusion.

Co., 552 F.Supp. 1305 (curtains). It is difficult to understand conceptually the application of the provision in the context of a single publication, and this Court questions whether it does apply in such a context. But see Canfield v. Ponchatoula Times, supra. However, this issue need not be addressed here, for Easten has failed to allege facts sufficient to show that defendants have infringed any copyrighted compilation.**

17 U.S.C. section 101 defines a compilation as "a work formed by the collection and asembling of the existing materials or of data that are selected, coordinated, or arranged in such a way

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By the same token the Court need not reach the question of whether a deliberate omission of the notice of copyright invalidates the copyright. Compare Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F2d 189, 194-96 (2d Cir. 1985) with Beacon Looms, Inc. v. S. Lichtenberg & Co., supra.

that the resulting work as a whole constitutes an original work of authorship ..." The fact that the materials compiled in the "Armed Forces News" are government publications, which are not copyrightable, 17 U.S.C. section 105, is not dispositive. "A compilation is capable of being copyrighted even where it merely consists of a selection or arrangement of facts which individually would not be copyrightable but the originality involved in the selection and/or arrangement of such facts is sufficient to constitute the resulting compilation of a protectable literary work ..." Southern Bell Tel. & Tel. v. Assoc. Telephone Dir., 756 F2d 801, 809 (11th Cir. 1985). Here, however, Eastern has failed to allege facts sufficient to show that defendants have copied an original work or a compilation. To the contrary, Eastern

claims that "certain Defendants ... cut out certain portions of Plaintiff's protected works, re-positioned certain portions thereof [and] pasted these portions together." Similarly, Eastern alleges that defendants "took the cutout portions of Plaintiff's newspapers containing copyright protection and reassembled, retouched ... and removed certain identifying wording from it." Thus, according to Eastern itself, defendants have recompiled the compilation. Absent more specific averments (which Eastern has failed to make despite having been given the opportunity to do so), this process of recompilation cannot be said to constitute copyright infringement.

RICO Claim

The predicate acts upon which Eastern relies as a basis for its RICO claim all relate to a single alleged

scheme. Defendants are alleged to have breached duties which they owed to Eastern by establishing "The Military News" while still working for Eastern and to have wrongfully appropriated materials from the "Armed Forces News." What constitues a "pattern of racketeering activity" under RICO is, of course, subject to continuing disagreement, and the Fourth Circuit has not yet provided definitive guidance on the point. Whether such a pattern can exist only where there are more than two alleged schemes or episodes, see Frankart Distributors, Inc. v. RMR Advertising, 632 F.Supp. 1198, 1200 (S.D.N.Y. 1986); Northern Trust Bank/ O'Hare, & A v. Inryco Co., 615 F.Supp. 828, 831 (N.D. 111. 1985), or whether it may inhere in a single open-ended scheme, see, e.g., Temporaries, Inc. v. Maryland National Bank, Civil No. Y-84-4519 (D. Md. June

6, 1986), has not been settled. However, while there may be some authority to the contrary, see, e.g., R.A.G.S. Couture, Inc. v. Hyatt, 774 F2d 1350 (5th Cir. 1985); Conan Properties, Inc. v. Mattel, supra, this Court is firmly of the view that a single scheme with a single defined purpose and a single victim is not sufficient to meet the pattern requirement even if numerous acts of fraudulent mailing or wire communications are made to effect the scheme. See generally Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct. 3275 (1985). Since Eastern alleges only such a single scheme, its RICO claim fails.

Anti-Trust Claims

Eastern's anti-trust claims are grounded upon defendants' alleged acts of copyright infringement and appropriation of Eastern's confidential business information. Although, as this

Court suggested to Eastern's counsel during oral argument on the original motions to dismiss, these alleged wrongs may give rise to various state causes of action, they do not constitute the type of conduct which the anti-trust laws are designed to protect against. See Bunker Ramo Corp. v. United Business Forms, Inc., 713 F2d 1272, 1283 (7th Cir. 1983). Eastern alleges that defendants' alleged wrongful acts will damage competition, but the facts alleged by Eastern made it clear that all that is actually being alleged is damage to Eastern as a competitor. No cognizable anti-trust injury, which Eastern concedes is required, see, e.g. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89 (1977), has been alleged. This is apparent from the simple fact that prior to defendants' actions, there was one competitor (Eastern) in what Eastern

alleges to be the relevant geographical and product markets and, if defendants are successful in driving Eastern out of business (as Eastern alleges they are trying to do), there will be one competitor (Chesapeake) in the relevant markets. This fact makes clear that this is a classic case in which what is actually being alleged is unfair competition in the guise of an anti-trust claim.

For these reasons, defendants' motions to dismiss will be granted. A separate order to that effect is being entered herewith.

Date:

December 12, 1986 /s/

J. Frederick Motz
United States
District Judge

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EASTERN PUBLISHING AND ADVERTISING, INC.	*	
v.	*	Civil No. JFM-86-1653
CHESAPEAKE PUBLISHING AND ADVERTISING, INC.	*	

****

ORDER

For the reasons stated in the memorandum entered herein, it is this 12th day of December, 1986,

ORDERED that defendants' motions to dismiss be granted.

/s/
J. Frederick Motz
United States
District Judge

STATUTES AND RULES PROVISIONS INVOLVED

17 USC, ss 405. Notice of copyright: Omission of notice

(a) Effect of Omission on Copyright. - The omission of the copyright notice prescribed by sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if -

(1) the notice has been omitted from no more than a relatively small number of copies of phonorecords distributed to the public; or

(2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is

made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or . . .

(b) Effect of Omission or Innocent Infringers. - Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made under section 408, if such person proves that he or she was misled by the omission of notice. In a suit for infringement in such a case the court may allow or disallow recovery for any of the infriger's profits attributable to the infringement, and may enjoin the

continuation of the infringing undertaking or may require, as a condition for permitting the continuation of the infringing undertaking, that the infringer pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

18 USC, ss 1961. Definitions.

As used in this chapter -

(1) "racketeering activity" means (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 1341 (relating to mail fraud), section 1343 (relating to wire fraud).

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the

commission of a prior act of racketeering activity;

18 USC, ss 1984. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 USC, ss 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

RULES

FEDERAL CIVIL RULES

RULE 12. Defense and Objections - When and How Presented - By Pleading or

Motion - Motion for Judgment on the Pleadings

(a) When Presented. A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EASTERN PUBLISHING AND ADVERTISING, INC., (A Close Corporation) T/A "ARMED FORCES NEWS",
Petitioner,

v.

CHESAPEAKE PUBLISHING AND ADVERTISING, INC., (A Close Corporation) T/A "THE MILITARY NEWS"; KAREN A. HORN; KIMBERLY J. HORN; CAROL WHITNEY ANSELL; DELLA LEMMINGS; ALFRED E. CLASING, III; RAYMOND J. CANNOLES; AND LOUISE MARTINS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENTS

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* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

I. Whether the Court below was correct in its determination that the Amended Complaint failed to allege facts which would support a finding that Petitioner's works were protected by the Copyright Act, 17 U.S.C. § 101 *et seq.*?

II. Whether the Court below was correct in its determination that the Amended Complaint failed to allege facts which would support a finding that Respondents' activities resulted in a sufficient pattern of racketeering activity as described in 18 U.S.C. § 1961 *et seq.*?

III. Whether a Court may dismiss an Amended Complaint under F.R.Civ.P. 12(b)(6) when the Amended Complaint fails to allege essential elements of a cause of action?

PARTIES TO THE PROCEEDING

A list of the parties to the proceeding has been omitted pursuant to Rule 34.2 of the Supreme Court Rules.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1530

EASTERN PUBLISHING AND ADVERTISING, INC., (A Close Corporation) T/A "ARMED FORCES NEWS",
Petitioner,

v.

CHESAPEAKE PUBLISHING AND ADVERTISING, INC., (A Close Corporation) T/A "THE MILITARY NEWS"; KAREN A. HORN; KIMBERLY J. HORN; CAROL WHITNEY ANSELL; DELLA LEMMINGS; ALFRED E. CLASING, III; RAYMOND J. CANNOLES; AND LOUISE MARTINS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

Citations to the opinions delivered in the Courts Below have been omitted pursuant to Rule 34.2 of The Supreme Court Rules.

JURISDICTIONAL STATEMENT

The jurisdictional statement has been omitted pursuant to Rule 34.2 of the Supreme Court Rules.

RELEVANT STATUTORY AUTHORITY

The pertinent text of the relevant statutory provisions is set forth in the Appendix.

STATEMENT OF THE CASE

Respondent does not deem it necessary to include a statement of the case to point out inaccuracies or omissions in Petitioner's Statement of the Case. Respondent directs this Court's attention to the fact that the Courts below made no findings of fact. The Courts below accepted, for the purposes of the Motion to Dismiss, the well pled factual allegations contained in the Petitioner's Amended Complaint.

REASONS FOR DENYING THE WRIT

Petitioner has given no special and important reasons for this Court to exercise its special discretion in granting Certiorari. Petitioner has not demonstrated, through its facts or arguments of law, a conflict in the circuits or an inappropriate treatment of a federal question.

The decision of the United States Court of Appeals for the Fourth Circuit does not present this Court with a judicially created impediment to the statutory elements of the copyright laws. Rather, the Courts below applied the words of the statute, 17 U.S.C. 405(a), to the facts alleged in Petitioner's Amended Complaint and achieved the proper result.

The Courts below correctly applied 18 U.S.C. §§ 1961 *et seq.* to the facts alleged in Petitioner's Amended Complaint in dismissing the civil RICO claims. The Courts below, relying on the language of the statute and this Court's treatment of that language in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), correctly concluded that Petitioner failed to allege facts sufficient to support a finding of a "pattern" of racketeering activity.

Petitioner has had two opportunities to state claims upon which relief can be granted and has failed to do so. Rather than amend the Complaint to state such facts, Petitioner has chosen to rest on the inadequate Amended Complaint.

For the reasons stated this Court should deny the Writ of Certiorari sought by Petitioner.

SUMMARY OF ARGUMENT

Petitioner's Amended Complaint fails to allege the essential elements of the causes of action asserted. As a result, dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) was appropriate.

Petitioner has not demonstrated that its failure to place copyright notice on the newspapers is excused under 17 U.S.C. § 405(a). No facts have been advanced to demonstrate that either a "relatively small number" of copies were distributed without notice, or, that a reasonable effort to place notice on distributed copies was made. This failure is detrimental to the copyright protection sought by Petitioner.

Petitioner's Amended Complaint fails to set forth facts sufficient to demonstrate a pattern of racketeering activity. Petitioner evidently relies on the allegation that two or more separate acts of mail or wire fraud may have occurred. This Court said in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 that two acts may not be sufficient. Petitioner has not set forth any facts to support a threat of continuing activity, i.e., a pattern.

Petitioner has failed to allege certain essential elements to the causes of action asserted. Consequently, the Amended Complaint fails to state claims upon which relief may be granted. Accordingly, this Court should deny the Petitioner's Writ for Certiorari.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE AMENDED COMPLAINT FAILED TO ALLEGE FACTS SUFFICIENT TO WITHSTAND A MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6).

A. Eastern Publishing, Inc.'s failure to place copyright notice on the newspapers and advertisements is not excused under 17 U.S.C. § 405(a).

The Circuit Court correctly applied 17 U.S.C. § 405 to the facts alleged in the Amended Complaint in determining that the Complaint failed to state a claim upon which relief could be granted with respect to copyright infringement. The registered copyright affords no protection to Eastern unless the failure to place notice is excused under 17 U.S.C. § 405(a). This section excuses omission of notice if:

> (1) The notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or
>
> (2) Registration for the work has been made before or is made within five (5) years after the publication without notice, *and* a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered.

17 U.S.C. § 405(a) (emphasis added).

The Amended Complaint fails to set forth facts which would indicate that only a "relatively small number" of newspapers were distributed without notice. In fact, it appears from the Amended Complaint that all of petitioner's newspapers were printed without notice of copyright prior to the institution of this action. *See* Amended Complaint pp. 9-10, ¶ 19, "Plaintiff also has deposited prior published serial issues of this newspaper . . . for

copyright registration and has included notice of copyright on all subsequent issues prior to their publication". Consequently, petitioners cannot meet the first exception of § 405 because based on the facts alleged in the Amended Complaint, all of Petitioner's newspapers, both the disputed issues in this action and those which predated the disputed issues, were injected into commerce without notice. *Long v. CMD Foods, Inc.*, 659 F. Supp. 166, 168 (D. Ark. 1987).

Petitioners fail to meet the second prong of § 405(a) because the Amended Complaint is devoid of any allegations or facts which would show that any reasonable effort was made to attach notice "to all copies . . . that are distributed to the public in the United States after the omission has been discovered." 17 U.S.C. § 405; *CMD Foods, Inc.*, 659 F.Supp. at 169.

B. Eastern Publishing, Inc. failed to allege essential elements of copyright infringement sufficient to withstand a F.R.Civ.P. 12(b)(6) Motion to Dismiss.

Applying the *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189 (2nd Cir. 1985), view which allows § 405 cure for both intentional and unintentional omissions, provides little relief to Petitioner. Whether or not the omission was intentional is not dispositive of the claim. The failure, however, to allege circumstances which, if proven to be true, would grant relief is dispositive of the issue. Petitioner's Amended Complaint fails to state a claim for which relief can be granted as it neglects to allege the most important of elements in a copyright infringement action; that is, a valid copyright.

To make out a *prima facie* case of copyright infringement, the plaintiff must show ownership of a valid copyright and subsequent copying by the defendant. *Southern Bell Telephone and Telegraph v. Associated Telephone Directory Publishers*, 756 F.2d 801, 810 (11th Cir. 1985); 3 M. Nimmer, *Nimmer on Copyright*, § 13.01, at

13-3 (1987). In this action, Petitioners have claimed copyright protection "in two specific issues of its publication, each of which necessarily only had a limited period of distribution but also a very limited lifespan in the hands of a consumer." *Eastern Publishing and Advertising, Inc. v. Chesapeake Publishing and Advertising, Inc.*, 831 F.2d 488, 491 (4th Cir. 1987). The obvious result is that any subsequent notice placed on different issues of "Armed Forces News" would be wholly ineffective in apprising subsequent users that past issues of "Armed Forces News" were protected under the copyright laws. *Id.* The Circuit Court was correct in concluding that to comply literally with the second prong of § 405(a)(2) one must "proceed on the premise that products protectable under § 405(a)(2) must have continued distribution, at least from a retailer, as well as continued use in the hands of a consumer or retailer." *Id.; See also Lifshitz v. Walter Drake and Sons, Inc.*, 806 F.2d 1426, 1433 (9th Cir. 1986).

The court correctly pointed out that in *Canfield v. Ponchatoula Times*, 759 F.2d 493 (5th Cir. 1985), the second prong of § 405(a)(2) was applied to a newspaper. It is important to note, however, that the *Canfield* case dealt specifically with advertisements which appeared in the newspaper and have the ability to be reproduced in subsequent issues of the newspaper. The § 405(a)(2) test was not applied to the entire newspaper compilation itself. Moreover, because the advertisement itself did not bear a copyright notice, and the plaintiff asserting protection "failed to show that, after discovering the omission, it made any effort to add the required notice to copies of the advertisement distributed to the public," copyright protection in the advertisement was lost. *Canfield*, 759 F.2d at 499.

C. Eastern Publishing, Inc. failed to allege facts sufficient to show infringement of a copyrighted compilation.

The District Court, Judge Motz presiding, correctly found that the process of recompilation by Respondents does not constitute copyright infringement. "A compilation is capable of being copyrighted even where it merely consists of a selection or arrangement of facts which individually would not be copyrightable but the originality involved in the selection and/or arrangement of such facts is sufficient to constitute the resulting compilation of a protectable literary work . . . ." *Southern Bell Tel. & Tel. v. Assoc. Telephone Dir.*, 756 F.2d 801, 809 (11th Cir. 1985). Moreover, copyright law only requires that the author make "a new arrangement or presentation" of the material in order to protect that which is otherwise in the public domain. *Rockford Map Publishing, Inc. v. Director Service Co. of Colorado*, 768 F.2d 145, 149 (7th Cir. 1985). "Here, however, [Petitioner] has failed to allege facts sufficient to show that [Respondents] have copied an original work or a compilation." *Eastern Publishing and Advertising, Inc. v. Chesapeake Publishing and Advertising, Inc.*, Civil No. JFM-86-1653, (D.Md. Dec. 12, 1986), A-36.

The averments in Petitioner's Amended Complaint defeat a claim for copyright infringement. Petitioner alleges that "certain Defendants . . . cut out certain portions of Plaintiff's protected works, repositioned certain portions thereof [and] pasted these portions together." *Id.* at A-33. Consequently, Petitioner's Amended Complaint alleges that Respondents have recompiled government publications, which are not copyrightable, from a compiled source which lacks copyright protection.

Absent more specific factual allegations which, if proven to be true, would demonstrate that Petitioner's compilation was sufficiently original to merit copyright protection, and that the failure to include copyright no-

tice was excused pursuant to 17 U.S.C. 405(a), the Amended Complaint insufficiently states a claim upon which relief can be granted.

II. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE AMENDED COMPLAINT FAILED TO ALLEGE FACTS SUFFICIENT TO SUPPORT A FINDING THAT RESPONDENTS WERE INVOLVED IN A PATTERN OF RACKETEERING ACTIVITY AS SET FORTH IN 18 U.S.C. §§ 1961 *et seq.*

A. Eastern Publishing, Inc. failed to allege facts which, if proven to be true, sufficiently constitute a "pattern" of racketeering activity.

With respect to the civil RICO claim asserted by Eastern, both the district court and the circuit court correctly determined that the Amended Complaint failed to allege a pattern of RICO activity. In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 N.14 (1985), this Court stated:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) [emphasis supplied], not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effected. It is this factor of *continuity plus relationship* which combines to produce a pattern. S. Rep. No. 91-617, p. 158 (1969) [emphasis supplied].

In *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149 (4th Cir. 1987), the Fourth Circuit, relying on this Court's language in *Sedima*, concluded "that as a general proposition 'a single, limited fraudulent scheme,' notwithstanding it might include the requisite minimal number of sufficiently related predicate acts would not constitute the 'pattern' of racketeering activity contemplated by Congress." *Eastern*, 831 F.2d at 492 (quoting *Zepkin*, 812 F.2d at 155).

While the Amended Complaint of the Petitioner may state facts to support one or more mail and wire fraud activities, it fails to allege facts sufficient to support a *pattern* of racketeering activity. The Circuit Court felt that the end result was "a single, nonrecurring scheme to defraud a single entity by taking unfair competitive advantage in a quite narrow business context." The view of the Circuit Court in *Zepkin* and *Eastern* is consistent with the views of other courts. *See Medallion TV Enterprises v. SELECTV of California, Inc.*, 627 F. Supp. 1290, 1296-97 (D. Cal. 1986) (series of calls and letters over a two month period constitutes a single criminal episode, not a "pattern of activity"); *Phelps v. Wichita Eagle-Beacon*, 632 F. Supp. 1164, 1171-72 (D. Kan. 1986) (several telephone conversations and mailings in furtherance of single ongoing scheme to harm plaintiff not a RICO "pattern"); *Grant v. Union Bank*, 629 F. Supp. 570, 578 (D. Utah 1986) (multiple mail and wire conviction in furtherance of single fraudulent loan scheme not a RICO pattern). Accordingly, Petitioner's mere conclusory statements in the Amended Complaint fail to allege facts which, if proven to be true, would support liability under the civil RICO act.

III. THE CIRCUIT COURT CORRECTLY DISMISSED PETITIONER'S AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6).

A. Dismissal for failure to state a claim upon which relief can be granted is proper when the complaint fails to allege essential elements of a cause of action.

A complaint should be dismissed when it fails to allege the essential elements of the cause of action asserted. *Shewmaker v. Minchew*, 666 F.2d 616, 617 (D.C.Cir. 1981) (*per curiam*). Moreover, when the complaint fails to allege compliance with the copyright registration requirements, a motion to dismiss a copyright infringement claim should be granted. *Quincy Cablesystems, Inc. v. Sully's Bar, Inc.*, 650 F.Supp. 838, 851 (D.Mass. 1986).

In this action the dismissal was appropriate as Petitioner failed to allege, in the original and Amended Complaints, the essential elements of the causes of action asserted. Accordingly, the Complaint was properly dismissed "under Rule 12(b)(6) since it is clear from the face of the complaint that [Petitioner] can prove no set of facts that would entitle [it] to relief." *Madison v. United States*, 752 F.2d 607, 609 (11th Cir. 1985).

Because the Complaint failed to allege the essential prerequisites to these causes of action there are no circumstances which can be proven which entitled Petitioner to relief.

CONCLUSION

For the reasons stated above, Respondents, Chesapeake Publishing and Advertising, Inc., *et al.* respectfully request that this Court deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1520

EASTERN PUBLISHING AND ADVERTISING, INC., (A Close Corporation), t/a "ARMED FORCES NEWS",
Plaintiff-Appellant,

v.

CHESAPEAKE PUBLISHING AND ADVERTISING, INC., (A Close Corporation), t/a "THE MILITARY NEWS"; KAREN A. HORN; KIMBERLY J. HORN; CAROL WHITENEY ANSELL; DELLA LEMMINGS; ALFRED E. CLASING, III; RAYMOND J. CONNOLES; LOUISE MARTINS,
Defendant-Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
J. Frederick Motz, District Judge—(CA-86-1653-JFM)

Argued: June 29, 1987 Decided October 16, 1987

Before PHILLIPS, ERVIN, and WILKINSON,
Circuit Judges

William Edward Seekford for Appellant; John Joseph Kuchno (Henry R. Lord; Piper & Marbury; Charles Martinez; Eccleston & Seidler on brief) for Appellees.

PHILLIPS, Circuit Judge:

Appellant Eastern Publishing and Advertising, Inc. (Eastern), appeals the Rule 12(b)(6) dismissal of its

claims against a competing publisher, Chesapeake Publishing and Advertising, Inc. (Chesapeake), former Eastern employees, and former associates in the law firm that represents Eastern, alleging copyright infringement and R.I.C.O. and antitrust violations. We affirm the dismissal of the copyright claim because Eastern failed to attach the requisite notice to the advertisements and to the issues of its newspaper, "Armed Forces News," on which it claims copyrights. We also affirm dismissal of the civil R.I.C.O. and antitrust claims on the grounds relied upon by the district court.

I

Eastern publishes a quarterly newspaper, "Armed Forces News," which is directed to military personnel and their dependents and which consists of original advertising and publicly available government press releases. Chesapeake publishes a competing newspaper, "The Military News." Claiming that its publication is entitled to copyright protection as a "compilation" under 17 U.S.C. §§ 101, 103, even though the government publications that make up the newspaper are not themselves copyrightable, 17 U.S.C. § 101, Eastern claimed that Chesapeake infringed its copyrights in two issues of the "Armed Forces News," Volume V, Number III and Volume VI, Number IV. Eastern also claimed that Chesapeake infringed valid copyrights in individual advertisements appearing in those same issues. Volume V, Number III first was published on March 22, 1986, and Volume VI, Number IV on March 27, 1986. Eastern registered copyrights in these materials on May 9 and May 20, 1986, respectively. Copyright notices appeared on subsequent issues of the publication. No copyright notices appeared on the advertisements.

Appellees Karen Horn, Kimberly Horn, Carol Ansell, and Della Lemmings were employees of Eastern until April 1986. Appellees Alfred Clasing and Raymond Cannoles worked with the law firm retained by Eastern

before formation of Chesapeake; appellee Louise Martins currently works with Clasing and Cannoles. Clasing, Cannoles, and Martin are Chesapeake directors, and Karen Horn is the company're resident agent. According to Eastern's complaint, the various named defendants were responsible for photocopying, cutting apart, and reassembling Volume V, Number III and Volume VI, Number IV of "Armed Forces News" to create and publish "The Military News." Eastern further alleged that unidentified defendants represented to Eastern's advertising customers that Chesapeake was connected to Eastern and that the customers could renew their advertisements in Eastern's publication through Chesapeake. These customer contacts were alleged to have taken place through the mails and by interstate wire and telephone transmissions on various occasions during March, April, and May 1986.

In addition to claiming that publication of "The Military News" infringed Eastern's copyrights, Eastern charged that Chesapeake's exploitation of its customers led to a decline in the number of "Armed Forces News" customers, while the number of Chesapeake's customers increased to the point that Chesapeake now controls the relevant market. Thus, according to Eastern, Chesapeake's activities have injured competition in violation of federal antitrust laws, 15 U.S.C. §§ 1-15. Eastern did not allege before the district court that any other competitor beside itself had been injured, but on appeal Eastern submits that at least three other competitors exist and that at least one of these has been injured competitively. Finally, Eastern charged Chesapeake with civil R.I.C.O. violations for having committed multiple acts of mail and wire fraud in misleading Eastern's customers into publishing advertisements in "The Military News."

In ruling on appellees' 12(b)(6) motion, the district court found: (1) there was no copyright infringement

because defendant's publication amounted to a recompilation of the copyrighted issues of "Armed Forces News"; (2) there was no "pattern" of racketeering activity to support the R.I.C.O. claim; and (3) the facts alleged did not demonstrate the injury to competition required for an antitrust claim.

This appeal followed.

II

Eastern claims copyright in two separate sets of material: (1) advertisements published in "Armed Forces News"; and (2) particular issues of the newspaper, Volume V, Number III and Volume VI, Number IV. To succeed on a copyright claim, one asserting copyright protection must have registered the copyright, 17 U.S.C. § 411(A); *Conan Properties, Inc. v. Mattel, Inc.*, 601 F. Supp. 1179, 1182 (S.D.N.Y. 1984). *International Trade Management, Inc. v. United States*, 553 F. Supp. 402 (Ct. Cl. 1982), and must also have attached notice of copyright on all publicly distributed copies of the protected item. 17 U.S.C. § 401(a); *e.g., M. Kramer Manufacturing Co. v. Andrews*, 783 F.2d 421, 443 (4th Cir. 1986).

No notice appeared on the individual advertisements. 17 U.S.C. § 404(a) permits a copyright notice on a compilation of work as a whole to cover individual parts of the whole, unless the individual part is an advertisement for the benefit of someone other than the holder of the copyright in the entire collective work. A newspaper claiming copyright ownership in an advertisement prepared for another must give specific and separate notice of its copyright in the advertisement. *See Canfield v. Ponchotoula Times*, 759 F.2d 493 (5th Cir. 1985). Therefore, even if notice of copyright was affixed properly to the newspaper to cover the publication as a whole, that notice would not cover the individual advertisements, and there can be no copyright infringement as to them.

There also was no notice on the two issues of "Armed Forces News" for which copyrights were registered on May 9 and May 20, 1986. Assuming these issues were copyrightable as "compilations," which are selections or arrangements of even uncopyrightable material in an original way, *see Southern Bell Telephone and Telegraph Co. v. Associated Telephone Director Publishers*, 756 F.2d 801, 809 (11th Cir. 1985), the registered copyrights lend no protection to Eastern unless the failure to place notice upon them is excused under 17 U.S.C. § 405(a). Section 405(a)(2) excuses omission of notice if

> registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered.

Eastern, having registered copyrights in the March 22 and March 27 issues on May 9 and May 20, and having placed general copyright notices on subsequent issues of the "Armed Forces News," claims that its copyright is preserved by the § 405(a)(2) excuse.

The District Court declined, in dictum, to excuse the failure to give notice under § 405(a)(2) because it believed this section of the Copyright Act "is most clearly applicable to products identical to one another which are in continuous production," citing *Original Appalachian Artworks, Inc. v. Toy Loft*, 684 F.2d 821, 826-27 (11th Cir. 1982) (dolls); *Shapiro & Son Bedspread Corp. v. Royal Mills Associates*, 568 F. Supp. 972, 976-77 (S.D. N.Y. 1983) (bedspreads); *Beacon Looms, Inc. v. S. Lichtenberg & Co.*, 552 F. Supp. 1305 (S.D.N.Y. 1982) (curtains); *but cf. Canfield*, 759 F.2d 493 (considering the § 405(a)(2) exception in a case involving newspapers). Our research reveals only one case in which § 405(a)(2) has been invoked to preserve copyright pro-

tection for an article that is not in constant production, *Werlin v. The Reader's Digest Association*, 528 F. Supp. 451, 461 (S.D.N.Y. 1981), and we decline to follow its lead on the fact of this case. We therefore agree with the District Court that § 405(a)(2) does not apply unless there is continuous production of identical products, and for reasons that follow, we think that was not shown here.

Here, Eastern has claimed a copyright in two specific issues of its publication, each of which necessarily had not only a limited period of distribution but also a very limited lifespan in the hands of a consumer. Subsequent notice placed upon later, different issues of "Armed Forces News" is ineffective to alert others that copyrights cover earlier issues. It is also impossible for Eastern to attach notice to the issues in question and thereby to comply literally with the second prong of § 405(a)(2).

Cases considering the related question whether one claiming protection under § 405(a)(2) must place notices of copyright on products already distributed to customers or only on products still in the hands of a retail seller support this conclusion. *See e.g., M. Kramer*, 783 F.2d at 444; *Donald Frederick Evans and Associates, Inc. v. Continental Homes*, 785 F.2d 897, 911 n.22 (11th Cir. 1986). Whatever their particular conclusions, these causes, like those construing the "reasonable effort" required by § 405(a)(2), proceed on the premise that products protectible under § 405(a)(2) must have continued distribution, at least from a retailer, as well as continued use in the hands of a consumer or retailer. That simply is not the case with respect to the discrete issues of newspapers for which protection is sought here. These products obviously do not have those essential aspects.

Because the savings provision of § 405(a)(2) does not apply here, Eastern's failure to give notice is not excused, and the two publications of "Armed Forces News" do not merit copyright protection.

III

We also agree with the District Court's dismissal of Eastern's civil R.I.C.O. claim. The essential elements of this type of R.I.C.O. claim are: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). The racketeering activities upon which Eastern's claim is based are mail and wire fraud allegedly committed when appellees solicited appellant's advertising customers, misrepresenting that they were working on behalf of the "Armed Forces News." The district court found that these instances of mail and wire fraud did not establish the requisite "pattern" for a successful R.I.C.O. claim.

We think decision here is controlled by our interpretation and application of the "pattern" requirement in *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149 (4th Cir. 1987). In that case, drawing on the Supreme Court's recognition in *Sedima*, 473 U.S. 479, that more careful adherence by the courts to this requirement might properly limit civil R.I.C.O. claims to their proper scope, we concluded that "no mechanical test can determine the existence of a R.I.C.O. pattern," and that the question is necessarily a "matter of criminal dimension and degree" to be decided on a case-by-case basis. *Zepkin*, 812 F.2d at 155. The touchstone for assessing this we thought was revealed by the legislative history's emphasis that what was targeted was "not sporadic activity" but continuity or the threat of continuity of racketeering activity. *Id.* at 154. On this basis, we concluded that as a general proposition "a single, limited fraudulent scheme," notwithstanding it might include the requisite minimal number of sufficiently related predicate acts would not constitute the "pattern" of racketeering activity contemplated by Congress. *Id.* Such a single, limited scheme we thought was not the kind of "ongoing unlawful activities whose scope and persistence pose a

special threat to social well-being." *Id.* While we recognized that a scheme properly considered to be a "single" one might by virtue of its very size and continuity meet the test, we thought the typical fraudulent schemes, limited in occurrence, in scope, and in purpose, that have been the traditional subjects of state tort law were not intended to be swept into R.I.C.O.'s reach by Congress. *Id.*

On this basis we concluded that a R.I.C.O. complaint by investors alleging as predicate acts two violations of the securities laws in connection with the sale of securities did not sufficiently allege a pattern of R.I.C.O. activity. We held that the conduct charged was instead merely that of a "single, limited scheme" to defraud. Though it met the technical requirements of a sufficient number of predicate acts sufficiently related to each other, it failed to charge the kind and degree of continuous engagement in criminal conduct required to constitute a R.I.C.O. "pattern."

We think exactly the same analysis applies to the conduct charged here. The predicate mail and wire fraud acts charged are sufficient in number. They are sufficiently related in allegedly furthering Chesapeake's efforts to gain a competitive edge over Eastern. But in the end all that results is a single, non-recurring scheme to defraud a single entity by taking unfair competitive advantage in a quite narrow business context. There is no inference that the scheme embodies a threat of continued like activity in the future. Just as the scheme alleged in *Zepkin* was found wanting in the required degree of continuity of conduct, so is that here. The complaint fails to allege a R.I.C.O. pattern of racketeering activity. *See Medallion TV Enterprises v. SELECTV of California, Inc.*, 627 F. Supp. 1290, 1296-97 (C.D. Cal. 1986) (series of calls and letters over a two-month period constitutes a single criminal episode, not a "pattern of activity"); *Phelps v. Wichita Eagle-Beacon*, 632

F. Supp. 1164, 1171-72 (D. Kan. 1986) (several telephone conversations and mailings in furtherance of single ongoing scheme to harm plaintiff not a R.I.C.O. "pattern"); *Grant v. Union Bank*, 629 F. Supp. 570, 578 (D. Utah 1986) (multiple mail and wire conviction in furtherance of single fraudulent loan scheme not a R.I.C.O. pattern); *cf. Temporaries, Inc. v. Maryland National Bank*, 638 F. Supp. 118 (D. Md. 1986) (recognizing that single open-ended scheme might be so extensive in potential scope as to constitute pattern); *see also HMK Corp. v. Walsey*, —— F.2d ——, No. 86-3582 (4th Cir. Sept. 17, 1987) (applying *Zepkin* to find no pattern in single scheme extending over long period and involving many predicate acts aimed at corrupting political processes to gain competitive advantage).

IV

Eastern's antitrust claim is based upon the defendants' acts of copyright infringement and appropriation of confidential business information. The district court held this not to be the type of conduct at which the antitrust laws are aimed, and we agree. *See Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1271, 1283 (7th Cir. 1983). Moreover, the antitrust laws are inapposite here because the only damage is to Eastern as a *competitor*; there is no alleged injury to *competition* in the relevant market. *See id.*, at 1284-85; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Eastern complains on appeal that in finding no injury to competition, the district court erroneously believes that there were no competitors in the market other than Eastern and Chesapeake. The court noted that before the creation of Chesapeake, there was only one market entity, Eastern, and that if events transpire as Eastern predicts, there will only be one market entity, Chesapeake. Therefore, there was no injury to competition. Eastern now avers for the first time that

there are other competitors who are also harmed by Chesapeake's activities. We decline to take into account these other alleged competitors because their existence and injury were not averred in the complaint nor in any way suggested to the district court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1520

EASTERN PUBLISHING and
ADVERTISING, INC., ETC.,
Appellant,

versus

CHESAPEAKE PUBLISHING and
ADVERTISING, INC., ETC., *et al.*,
Appellees.

On Petition for Rehearing with
Suggestion for Rehearing In Banc

ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that leave to file the petition for rehearing out of time is granted and the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Ervin and Judge Wilkinson.

For the Court,

/s/ John M. Greacen
Clerk

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

November 27, 1987

TO: U.S. District Court for the District of Maryland at Baltimore

RE: 87-5120 Eastern Publishing v. Chesapeake Publish CA-86-1653-JFM

HEREWITH IS THE MANDATE OF THIS COURT IN THE ABOVE-ENTITLED APPEAL. The certified judgment and original record on appeal are returned ONLY to the district court/agency.

Enclosures:

× Opinion and Certified copy of the judgment

× Bill of costs form

× Original record on appeal consisting of

2 Volumes of pleadings

1 Volumes of transcripts

———Volumes of Exhibits

———Volumes other

3 TOTAL VOLUMES

———The record will be returned at a later date.

———The record was never transmitted by the D/Ct.

———Other ———

Please acknowledge receipt of these documents on the enclosed copy of this notice.

JOHN M. GREACEN,
Clerk

By: _____
E. MARSHALL BUCKLES
Deputy Clerk

Copies of this notice forwarded to:

William Edward Seekford, Esq.
Henry Robbins Lord, Esq.
John Joseph Kuchno, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-86-1653

EASTERN PUBLISHING AND ADVERTISING, INC.

v.

CHESAPEAKE PUBLISHING AND ADVERTISING, INC.

MEMORANDUM

Eastern Publishing and Advertising, Inc. has brought this action against persons formerly associated with it and against a new company, Chesapeake Publishing and Advertising, Inc., which these persons formed. Eastern publishes "Armed Forces News," a quarterly newspaper consisting of original advertising and publicly available government press releases. Defendants now publish a competing newspaper called "The Military News."

Eastern's original complaint contains claims for copyright infringement, willful copyright infringement, RICO violations, anti-trust violations, fraud, and unfair competition. After a hearing, this Court granted motions to dismiss filed by defendants as to the original complaint and granted plaintiff leave of Court to file an amended complaint. An amended complaint has now been filed which, except for the deletion of the fraud claim, is substantially identical to the original complaint. Defendants have renewed their motions to dismiss.

There is no diversity of citizenship between the parties and the only asserted basis for the subject matter jurisdiction of this Court is its federal question jurisdiction over the copyright, RICO and anti-trust claims. Since the Court finds that plaintiff has not stated any claim

for relief on these federal claims, it will decline to exercise its pendent jurisdiction over whatever state law claims plaintiff may be asserting and will not reach the legal issues raised by those claims. *Copyright infringement Claims.*

Section 411(a) of Title 17 of the United States Code provides that "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title." In the amended complaint plaintiff has identified only two issues of the Armed Forces News which have been properly registered. Accordingly, plaintiff's copyright claims are limited to those two issues. *See, e.g., Conan Properties, Inc. v. Mattel, Inc.*, 601 F.Supp. 1179, 1182 (S.D.N.Y. 1984); *International Trade Management, Inc. v. United States*, 553 F.Supp. 402 (Ct. Cl. 1982).

Eastern alleges that the two issues in question contain two types of copyrighted material: original advertising and a compilation of government publications (which are not themselves copyrightable). Eastern has never—either at the time of the original publication or since—placed notices of copyright upon the individual advertisements. Its failure to do so bars it from asserting that its copyrights for those advertisements have been infringed. *See Canfield v. Ponchatoula Times*, 759 F2d 593 (5th Cir. 1985).

The two issues in question likewise did not include notices of copyright. Eastern has placed copyright notices on subsequent issues and argues that the lack of notice on the prior ones is therefore excused under 17 U.S.C. section 405(a)(2). Section 405(a)(2) provides that omission of the copyright notice does not invalidate the copyright if "registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonograph records that are dis-

tributed to the public in the United States after the omission has been discovered." This section is most clearly applicable to products identical to one another which are in continuous production.* *See e.g., Original Appalachian Art Works, Inc. v. Toy Loft*, 684 F2d 821, 826-27 (11th Cir. 1982) (dolls); *Shapiro & Son Bedspread Corp. v. Royal Mills*, 568 F.Supp. 972, 976-77 (S.D.N.Y. 1983) (bedspreads); *Beacon Looms, Inc. v. S. Lichtenberg & Co.*, 552 F.Supp. 1305 (curtains). It is difficult to understand conceptually the application of a single publication, and this Court questions whether it does apply in such a context. *But see Canfield v. Ponchatoula Times, supra.* However, this issue need not be addressed here, for Eastern has failed to allege facts sufficient to show that defendants have infringed any copyrighted compilation.**

17 U.S.C. section 101 defines a compilation as "a work formed by the collection and assembling of the existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship . . ." The fact that the materials compiled in the "Armed Forces News" are government publications, which are not copyrightable, 17 U.S.C. section 105, is not dispositive. "A compilation is capable of being copyrighted even where it merely consists of a selection or arrangement of facts which individually would not be copyrightable but the originality involved in the selection and/or arrangement of such facts is sufficient to constitute the

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* Eastern also argues in its memorandum opposing defendants' motions to dismiss that section 405(a)(1) applies. However, the amended complaint alleges no facts to support that conclusion.

** By the same token the Court need not reach the question of whether a deliberate omission of the notice of copyright invalidates the copyright. *Compare Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F2d 189, 194-96 (2d Cir. 1985) with *Beacon Looms, Inc. v. S. Lichtenberg & Co., supra.*

resulting compilation of a protectable literary work . . ." *Southern Bell Tel. & Tel. v. Assoc. Telephone Dir.*, 756 F2d 801, 809 (11th Cir. 1985). Here, however, Eastern has failed to allege facts sufficient to show that defendants have copied an original work or a compilation. To the contrary, Eastern claims that "certain Defendants . . . cut out certain portions of Plaintiff's protected works, re-positioned certain portions thereof [and] pasted these portions together." Similarly, Eastern alleges that defendants "took the cutout portions of Plaintiff's newspapers containing copyright protection and reassembled, retouched . . . and removed certain identifying wording from it." Thus, according to Eastern itself, defendants have recompiled the compilation. Absent more specific averments (which Eastern has failed to make despite having been given the opportunity to do so), this process of recompilation cannot be said to constitute copyright infringement.

RICO Claim

The predicate acts upon which Eastern relies as a basis for its RICO claim all relate to a single alleged scheme. Defendants are alleged to have breached duties which they owed to Eastern by establishing "The Military News" while still working for Eastern and to have wrongfully appropriated materials from the "Armed Forces News." What constitutes a "pattern of racketeering activity" under RICO is, of course, subject to continuing disagreement, and the Fourth Circuit has not yet provided definitive guidance on the point. Whether such a pattern can exist only where there are more than two alleged schemes or episodes, *see Frankart Distributors, Inc. v. RMR Advertising*, 632 F.Supp. 1198, 1200 (S.D.N.Y. 1986); *Northern Trust Bank/O'Hare, & A v. Inryco Co.*, 615 F.Supp. 828, 831 (N.D. Ill. 1985), or whether it may inhere in a single open-ended scheme, *see, e.g., Temporaries, Inc. v. Maryland National Bank*, Civil No. Y-84-4519 (D. Md. June 6, 1986), has not

been settled. However, while there may be some authority to the contrary, *see, e.g., R.A.G.S. Couture, Inc. v. Hyatt*, 774 F2d 1350 (5th Cir. 1985); *Conan Properties, Inc. v. Mattel, supra*, this Court is firmly of the view that a single scheme with a single defined purpose and a single victim is not sufficient to meet the pattern requirement even if numerous acts of fraudulent mailing or wire communications are made to effect the scheme. *See generally Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3275 (1985). Since Eastern alleges only such a single scheme, its RICO claim fails.

Anti-Trust Claims

Eastern's anti-trust claims are grounded upon defendants' alleged acts of copyright infringement and appropriation of Eastern's confidential business information. Although, as this Court suggested to Eastern's counsel during oral argument on the original motions to dismiss, these alleged wrongs may give rise to various state causes of action, they do not constitute the type of conduct which the anti-trust laws are designed to protect against. *See Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F2d 1272, 1283 (7th Cir. 1983). Eastern alleges that defendants' alleged wrongful acts will damage competition, but the facts alleged by Eastern made it clear that all that is actually being alleged is damage to Eastern as a competitor. No cognizable anti-trust injury, which Eastern concedes is required, *see, e.g. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977), has been alleged. This is apparent from the simple fact that prior to defendants' actions, there was one competitor (Eastern) in what Eastern alleges to be the relevant geographical and product markets and, if defendants are successful in driving Eastern out of business (as Eastern alleges they are trying to do), there will be one competitor (Chesapeake) in the relevant markets. This fact makes clear that this is a

classic case in which what is actually being alleged is unfair competition in the guise of an anti-trust claim.

For these reasons, defendants' motions to dismiss will be granted. A separate order to that effect is being entered herewith.

/s/ J. Frederick Motz
United States
District Judge

Date: December 12, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-86-1653

EASTERN PUBLISHING AND ADVERTISING, INC.

v.

CHESAPEAKE PUBLISHING AND ADVERTISING, INC.

ORDER

For the reasons stated in the memorandum entered herein, it is this 12th day of December, 1986,

ORDERED that defendants' motions to dismiss be granted.

/s/ J. Frederick Motz
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM-86-1653

EASTERN PUBLISHING AND ADVERTISING, INC. (A CLOSE CORPORATION) T/A "ARMED FORCES NEWS, 619-A South Marlyn Avenue, Baltimore, Maryland 21221,
Plaintiff

vs.

CHESAPEAKE PUBLISHING AND ADVERTISING, INC. (A CLOSE CORPORATION) T/A "THE MILITARY NEWS" 6 North Taylor Avenue, Baltimore, Maryland 21221

and

KAREN A. HORN
6 North Taylor Avenue
Baltimore, Maryland 21221

and

KIMBERLY J. HORN
6 North Taylor Avenue
Baltimore, Maryland 21221

and

CAROL WHITNEY ANSELL
6 North Taylor Avenue
Baltimore, Maryland 21221

and

DELLA LEMMINS
6 North Taylor Avenue
Baltimore, Maryland 21221

and

ALFRED E. CLASING, III
818 Eastern Boulevard
Baltimore, Maryland 21221

and

RAYMOND J. CANNOLES
818 Eastern Boulevard
Baltimore, Maryland 21221

and

LOUISE MARTINS
818 Eastern Boulevard
Baltimore, Maryland 21221,
Defendant

AMENDED COMPLAINT
and
ELECTION FOR JURY TRIAL

I. NATURE OF THE ACTION

This Complaint arises out of Plaintiff's publications; as well as a creation of fixed works with exclusive rights of publication, titled "Armed Forces News", as well as Insurance Adjuster's Guide, Veterans News and other publications of Plaintiff *inter alia*, which are newspapers and publications serially prepared, and produced and which are printed quarterly in the District of Maryland and published and distributed, by region, throughout the United States. The paper entitled "Armed Forces News" is also a collective work which embodies Plaintiff's original advertising, design, wording, lettering, art work and configurations, which is fixed as an original together with a specific combination and compilation by selection, coordination, placement, arrangement and assemblage of prior issued and published government press releases which is entitled to and possesses federal statutory copyright protection owned by Plaintiff. Certain of those

serially published newspapers have also been properly registered pursuant to the Copyright Act of 1976, *Title 17, United States Code, Section 101, et seq.* prior to the filing of this suit and have received certificates of Copyright Registration effective prior to the filing of this suit. Claims represented *inter alia* herein allege copyright infringement in violation of that Act by Defendants.

This Complaint also states a claim for an unlawful and prohibited restraint of trade with unfair competition in trade contrary to the provisions of *Title 15, United States Code, Sections 1-15.*

The Complaint also alleges the knowing, wilful, fraudulent and unlawful conduct of Defendants in fraudulently misrepresenting directly and indirectly, that the various Defendant organizations are the same as, or part of, or connected with or have the right to use copyright materials of Plaintiff, and other such unlawful frauds and misrepresentations, set forth more fully, infra. Defendants utilized the United States Mail and interstate wire and telephone transmissions to pursue their fraudulent conduct. This part of the action arises in fraud, copyright infringement fraud and under the Racketeers Influenced and Corrupt Organizations Act of 1978, as amended, *Title 18, United States Code, Sections 1961, et seq.* (hereinafter sometimes cited as "RICO" and "RICO ACT").

II. PARTIES

2a. Plaintiff, Eastern Publishing and Advertising, Inc. (A Close Corporation) is organized and exists pursuant to the laws of the State of Maryland with its principal office at 619-A South Marlyn Avenue, Baltimore, Maryland 21221.

2b. Plaintiff is and has been the employer of persons who occasionally while so employed have created "works for hire" as "fixed" original literary works, designs,

drawings, art works, art forms, art and word compositions, together with selective compilation and configuration of released Pentagon and other government reports, notices and press released for Plaintiff some of which are obtained for Plaintiff only by Plaintiff's employees utilizing authorized Pentagon press passes of Plaintiff. Plaintiff is the lawful holder of all copyrights arising therefrom. Plaintiff is also the owner of certain property more particularly described, infra. Plaintiff has not conveyed or assigned such copyrights to Defendants, their enterprise or any other entity.

3a. Defendant "Chesapeake Publishing and Advertising, Inc." (A close Corporation) was recently organized pursuant to the laws of the State of Maryland with its principal office at 6 North Taylor Avenue, Baltimore, Maryland 21221. (Hereinafter sometimes called "Chesapeake").

3b. Defendant Chesapeake is engaged in selling advertising, printing and artwork to potential business purchasers thereof whose businesses are located in the State of Virginia, the District of Columbia, and other states of the United States and in so doing is engaging in the printing and publishing thereof in interstate commerce of a publication titled "The Military News" as well as "Veteran's Times", and other publications. Defendant Chesapeake and its agents, servants and employees and members of the "enterprise" utilize interstate wire transmissions and the United States Mail and mailings in furtherance of such business and the businesses of the enterprise and contacting potential customers, Plaintiff's customers, soliciting advertising, and renewal of advertising, making appointments, billing, collecting monies, depositing monies and checks, submitting billings, making refunds, causing the mailings of checks from depositing banks to collecting and payor banks, and delivery of publication copies, all of which is in and affects interstate commerce.

4. Defendant, Karen A. Horn is an individual; a resident of Maryland; the Resident Agent of and upon information and belief at all times relevant was and is a general supervisory employee and a controlling agent of Defendant Chesapeake and its business and employees.

5. Defendant, Kimberly J. Horn is a resident of Maryland, an individual and sister of Defendant, Karen A. Horn and is employed by and is an agent of Defendant Chesapeake and upon information and belief, *inter alia*, with respect to the enterprise and its activities, she assists in contract preparation, billing, invoicing, contracts with customers and controller of other office and client records and office materials.

6. Defendant, Carol Whitney Ansell, a resident of Maryland, is an individual and upon information and belief is employed by Defendant Chesapeake and with respect to the enterprise and its activities she assists in contacting clients, soliciting advertising, billing, collecting payments and other generally related work activities, with the other Chesapeake employees.

7. Defendant, Della Lemmings, a resident of Maryland, is an individual and is employed by and an agent of Defendant Chesapeake and upon information and belief with respect to the enterprise and its activities she is engaged on behalf of Defendant Chesapeake and the enterprise in soliciting advertising customers, assessing sales and space pricing, renewal advertising, getting executed customer contracts, collecting payments therefore, using interstate wire transmissions in furtherance thereof and training new personnel.

8. Defendant, Alfred E. Clasing, III, a resident of Maryland, is an individual and an incorporator of and a director of Defendant Chesapeake and controls the same.

9. Defendant, Raymond J. Cannoles, a resident of Maryland, is an individual and an incorporator of and

a director of Defendant Chesapeake and controls the same.

10. Defendant, Louise Martins, a resident of Maryland, is an individual and an incorporator of and a director of Defendant Chesapeake and controls the same.

11. Upon information and belief there are other and additional John Does and Jane Does, whose true names and identities and their participations are presently unknown to Plaintiff but who, upon discovery, will be made a party to this suit.

11a. These parties are all named as principles—for purposes of the federal statutes and involvement since all parties participating in the activities in the manner coming under *Title 18 U.S.C., Section 2 and 371* are principles or co-conspirators and are also principles.

III. JURISDICTION

12. Jurisdiction is invoked pursuant to *Title 28, U.S.C., Section 1331; Section 1391(b)* and *(c)*; and *Title 28, U.S.C., Section 1338(a)* and *(b)*; and *Section 1337(a)*.

This Court's jurisdiction is further authorized pursuant to *Title 18, U.S.C., Section 1964(a)* and *(c)* and *Section 2*.

IV. VENUE

13. This action is properly venued in this Court pursuant to *Title 18, U.S.C., Section 1965(a)* and *(b)*; *Title 28, U.S.C., Section 1400(a)*; and *Title 28, U.S.C., Section 1391(b)* and *(c)*.

a. Defendant Chesapeake Publishing and Advertising, Inc., is a corporation organized and which exists under the laws of Maryland and has its residence and principal office in and transacts its affairs in this and other Districts. *18 U.S.C. Section 1965(a)* and *Section 2* and *28 U.S.C., Section 1391(b)* and *(c)*, and *Section 1400(a)*.

b. Defendant Karen A. Horn resides in and transacts her affairs in this and other Districts.

c. Defendant Kimberly J. Horn resides in and transacts her affairs in this District.

d. Defendant Carol Whitney Ansell resides in and transacts her affairs in this District.

e. Defendant Della Lemmings resides in and transacts her affairs in this and other Districts.

f. Defendant Alfred E. Clasing, III resides in and transacts his affairs in this District.

g. Defendant Raymond J. Cannoles resides in and transacts his affairs in this District.

h. Defendant Louis Martins resides in and transacts her affairs in this District.

V. STATEMENT OF FACTS

14. Plaintiff, at all relevant times herein, was engaged in printing and publishing newspapers tabloids and reference materials which are usually printed quarterly with each separate serially produced newspaper or tabloid designated to be and is published in geographical areas which in most instances are defined by state boundaries. One of Plaintiff's newspapers is titled "Armed Forces News" and is geared for publication to military personnel and their families and dependents. Other publications include *inter alia* "Veteran's News" and "Labor Union News".

15. The Plaintiff, by its agents, servants and employees solicit advertising customers from the area of distribution who most often repetitively purchase advertising from Plaintiff for their businesses and its goods and services. In fulfilling the purchase and in preparing the advertising, Plaintiff employs persons to perform for it certain "work for hire" including creating designs, art work, drawings, wording, lettering with stroke design, and configuration which are "fixed" for purposes of and

are protected by copyright under *Title 17, U.S.C., Sections 101, et seq.*

16. The Plaintiff, by its agents, servants and employees using Plaintiff's Pentagon security press passes also obtains press releases at the Pentagon Press Room together with certain press releases from the federal Department of Labor and the Veteran's Administration as well as notices, written items, articles, memoranda and government press releases issued by various military and government installations which are delivered to and mailed to Plaintiff for inclusion in "Armed Forces News". Plaintiff then has its employees create and "fix" a "compilation", and "work for hire" under *Title 17, U.S.C., Section 103*, which is an originality of combination through selection, coordination, placement, arrangement and their assemblage together with original created fixed works which are of interest to and for consumption by military personnel and their families and dependants in the geographical area of publication.

17. The Plaintiff assembles both the paid advertising with its concomittant fixed copyright protected materials and the original compilation materials into a complete copyright protected newspaper "FLAT". (The original complete pre-printing assemblage from which the images are multiple printed) which is Plaintiff's original fixed copyright work.

18. Plaintiff, with respect to Volume V, Number III, and Vol. VI, No. IV, printed and published copyright materials created, fixed and owned by Plaintiff, registered them with the United States Register of Copyrights in accordance with the statute on May 9, 1986 and May 20, 1986, and received Certificates of Copyright Registration TX-1-819-477 and TX-1-819-476 respectively, with first publication into the State of Virginia for its Virginia advertisers and readers occurring on March 22 and 27, 1986 and by statutory deposit and filing of registration and of 2 copies thereof of the original work with the Register of Copyrights, Copyright

Office, at the Library of Congress pursuant to *Title 17, Sections 405(a)(2), 408, 411 and 412.*

19. Plaintiff, also has deposited other prior published serial issues of this newspaper and the other above publications for copyright registration and has included notice of copyright on all subsequent issues prior to their publication and has registered and deposited the same in accordance with the statute, all such registrations occurring within five (5) years of first publication, including, but not limited to, those published with Florida advertising copyrights. Notice of said copyright claim and registration given to the corporate Defendant and its manager.

20. Plaintiff, pursuant to *Title 17, Section 101, et seq* has the right to bring this action for infringement of said copyrights.

21. Defendants Karen A. Horn, Kimberly J. Horn, Carol Whitney Ansell and Della Lemmings, prior to April 14, 1986, were contracted by Plaintiff under employment contract as were others with various assigned duties, to perform work and labor in the Plaintiff's business and in such work were aware of the fixation of and the original creation of the works at issue by Plaintiff herein and the actual notice of the underlying right of copyright owned and possessed by Plaintiff in those works created herein including, but not limited to, "Armed Forces News" Volume V, Number III, printed and published on March 22, 1986, Volume VI, Number IV, printed and published on March 27, 1986.

22. Plaintiff is informed and believes and therefore alleges that Defendants, Alfred E. Clasing, III, and Raymond J. Cannoles, are attorneys formerly with a law firm utilized and employed by Plaintiff and John E. Tuchton, the sole incorporator, officer, stockholder, director and managing official of Plaintiff. As such, those Defendants knew and should have known that Plaintiff was engaged in the creation, printing and publishing of

the "Armed Forces News" the "Labor Union News", "Veteran's News" and "Insurance Claims Adjusters Guide" *inter alia* and their original copyright material contained therein owned by Plaintiff. Defendants Clasing and Cannoles also knew and should have known that Defendants Horn, Horn, Ansell and Lemmings were contracted by Plaintiff prior to April 14, 1986 and were involved in the sale of ads in the creation, production, possession, protection of, fixation and publication and care of Plaintiffs copyrighted materials, as well as printed copies of the present, prior and future issues of Plaintiffs various publications and in their key contract positions and duties relative to such copyright materials, the compiled customers lists, open and closed advertising contracts and other business records, trade secrets, business property and assets and knowing that none of which belonged to or were owned by those contractors employed by Plaintiff. These counsel also knew and had reason to know that on April 2, 1986; April 4, 1986; April 7, 1986; April 11, 1986; April 14, 1986 and April 21, 1986 and each day between those specific dates, and since to the date of this Amended Complaint, Defendants Horn, Horn, Ansell and Lemmings were contract employees or were regular salesman of Plaintiff and that they were not owners of such materials and owed Plaintiff a duty of good faith employment and loyalty and to act during such employment in accordance with the best interests of Plaintiff and its business and property and not to engage in conduct detrimental to Plaintiff's interests or which would be to the best interests of those Defendants and against plaintiffs which conduct would be an act of self dealing and wrongful be a possession and use and takings of Plaintiffs property, trade secrets, customers lists and copyright materials as it would be harmful to and in competition with Plaintiff and its rights and business.

23. Defendant Louise Martins, employed in the offices of Defendants Clasing and Cannoles, knew and had rea-

son to know of the facts and matters set forth in paragraph number 22 supra, prior to April 7, 1986 and thereafter.

24. Defendants Clasing, Cannoles and Martins on April 2, 1986 in agreement with Karen Horn and to provide for the creation of a printing and publishing corporation during such employment by Plaintiff prepared and executed written Articles of Incorporation for Defendant Chesapeake Publishing and Advertising, Inc. with the authorized purposes to create publications to compete with Plaintiff utilizing their business and employment address at 818 Eastern Boulevard, Baltimore, Maryland 21221 after associating themselves for that purpose. These Defendants were made Directors of that corporation which was a direct competitor against Plaintiff and the principal business address of the new corporation was designated to be 6 Taylor Avenue, Baltimore, Maryland 21221 with Defendant, Karen A. Horn, then employed by Plaintiff, named as resident agent with an address also at 6 Taylor Avenue, Baltimore, Maryland 21221.

25. The Articles of Incorporation were filed on April 4, 1986 at 10:19 a.m. in the Maryland State Department of Assessments and Taxation at Number D-2107894 by Defendant Clasing. The corporation was formed without any assets or contributions that would make it a lawful ongoing publishing concern and it had no customer lists, advertising or self created copyright material.

26. Plaintiff is informed and believes and therefore alleges that upon information and belief Defendants Clasing, Cannoles and Martins knew and had reason to know that the formation and creation of the corporate entity "Chesapeake Publishing and Advertising, Inc." without any necessary capital equipment, inventory, saleable advertising, trade secrets, customer lists and prior renewable contracts as to lawfully engage in such

business was to create a competitor printing and newspaper enterprise which was to employ the then contractors of Plaintiff to solicit advertising customers of Plaintiff, in direct competition with Plaintiff, which corporation was to join the enterprise and to be operated on a day to day basis from April 2, 1986 thereafter, even while Defendants Horn, Horn, Ansell and Lemmings continued to be employed by Plaintiff, while Plaintiff had no knowledge thereof or means to protect itself, and during the time those personnel assembled and took wrongful possession of Plaintiff's property, trade secrets, copyright materials, and confidential customer lists and renewable contracts.

27. Plaintiff is informed and believes and therefore alleges that upon information and belief, Defendants Clasing, Cannoles and Martins knew and had reason to know that Defendant "Chesapeake Publishing and Advertising, Inc." was a new corporation and enterprise which did not rightfully itself posess any advertising customer lists, telephone directories, advertising creations, artwork and any other necessary property to lawfully commence a newspaper business or to carry on such business or to carry out its stated and intended purposes and that in order to engage in the conduct contemplated and complained of herein that they would have to engage in unfair, unlawful competition and restraint of trade and to wrongfully and unlawfully infringe the lawful copyright of creators and the advertising, design, artwork and arrangements entitled to lawful copyright protection owned by their creators including Plaintiff herein.

Further that Defendants Horn, Horn, Ansell and Lemmings knew they had no lawfully obtained advertising material to present to potential customers when the corporation was created and when the business commenced and continued and that they would have to infringe Plaintiff's copyright material since it was the only advertising available or known to them.

Further, all Defendants knew and had reason to know that the newly formed corporation and the enterprise formed by them was without adequate initial capitalization, funding, property, supplies equipment and assets lawfully obtained to lawfully carry out its objectives. That each of the defendants participated with and joined the enterprise and aiding and abetting in the activities thereof.

28. During the period of contracted employment Plaintiff detrimentally relied upon Defendants Karen A. Horn, Kimberly J. Horn, Carol Whitney Ansell, and Della Lemmings to *refrain from* fraudulently (1) telephoning, contacting and soliciting Plaintiff's customers and advertising purchasers on behalf of themselves and any organizations competing with Plaintiff; (2) taking, removing from Plaintiff's possession and utilizing, on behalf of themselves and competing organizations, Plaintiff's non-published customer lists, prior customer contracts, renewal contracts on customers, copies of original copyright protected artwork, design and advertising, copies of prior volumes. Plaintiffs printed newspapers, Plaintiffs telephone directories, telephone criss-cross listings, briefcases with Plaintiffs identity, Plaintiffs employee Pentagon press room identification passes, Rand-McNally publications and other properties; (3) falsifying a connection or affiliation between Plaintiff and any other competing organization; (4) fraudulently deceiving Plaintiff's customers and advertisers into believing they had given their prior advertising, contracts, and payments to an affiliated or connected organization of Defendants' and thereby inducing Plaintiffs advertising customers to renew their advertising and advertising contracts with Defendants' corporation thereby also defrauding Plaintiff out of such renewal business and by using the copyright material and advertising of Plaintiff to do so and to produce Defendants infringing news papers containing the advertising unlawfully; (5) to engage in actions creating an illegal restraint of trade

upon Plaintiff using uncompensated infringement materials and tactics; and to assume control of and obtain agreements and payments for advertising created by Plaintiff from Plaintiff's customers while defrauding those customers out of a lawfully created and authorized reproduction of Plaintiff's copyrighted works and also defrauding Plaintiff out of proceeds for such reproduction and advertising arising out of such reproduction and copyright use and such customers to which Plaintiff was entitled.

29. Upon information and belief, no Defendant engaged in any lawful creation of any artwork, design, or advertising which was an original copyright fixed in any work, or themselves produced any newspaper owned by them, that was at any relevant time reproduced, copied, printed and published prior to May 12, 1986, by Chesapeake Publishing and Advertising, Inc. or any other company which copyright was owned or lawfully used by Defendant Chesapeake and the other Defendants in publishing into the State of Virginia "The Military News" newspaper on or about April 21, 1986 and other such subsequent publishings and newspapers and dates.

30. Defendants, Horn, Horn, Ansell and Lemmings on or about April 11, 1986 left the employ of Plaintiff, wrongfully possessing and unlawfully removing Plaintiff's materials, property and records aforesaid to be used by them and by the enterprise in the unlawful solicitation of Plaintiffs advertising customers through use of the Plaintiff's property and the subsequent infringement of Plaintiffs copyrights in the preparation, printing and publication of their infringing newspaper and printing enterprise and the defrauding of Plaintiff and its customers.

31. Plaintiff is informed and believes and therefore alleges that Defendants, on or before April 21, 1986, commenced the formal business operation of Defendant "Chesapeake" and, upon information and belief, had pre-

viously, while working for Plaintiff, agreed to such premises lease, installation of telephones, had business forms created and made numerous customer contacts, displaying Plaintiff's newspaper as their own as an example of the advertising to be reserved to Plaintiffs customers which was totally owned by Plaintiff who owned all rights of copyright.

32. Since on or about March, 1986 certain Defendants knowingly, wilfully and intentionally, through the United States Mail, fraudulently and falsely have claimed, contended and implied that the soliciting entity—Defendant, "Chesapeake" or "The Military News", by whatever name and Defendants Horn, Horn, Ansell and Lemmings were affiliated with, connected with, or part of Plaintiff and have made numerous postal mailings in furtherance thereof including, but not limited to, mailings of checks, contracts, billings, and invoices and causing the mailing of customers checks by depositing them in Maryland National Bank for clearance by mail to the payor bank and thereafter to the customer by bank statements.

33. Since on or about March, 1986 certain Defendants herein knowingly, wilfully and intentionally used the interstate wire and telephone transmissions to pursue their fraudulent conduct by falsely and fraudulently contacting Plaintiffs advertising customers to seek renewal of Plaintiff's advertising to cause it to be reproduced in Defendant's competing organization newspaper and in so doing have falsely claimed, contended and implied that the soliciting entity—Defendant "Chesapeake" or "The Military News", by whatever name is affiliated with, connected with, or part of Plaintiff and that this contract would be a renewal of Plaintiff's former contract and advertising production.

34. That certain Defendants herein have on several subsequent occasions cut out certain portions of Plaintiff's protected works, re-positioned certain portions thereof, pasted those portions together, removed Plaintiff's identifying marks, and pagination and photocopies those portions

into an infringing reproduction newspaper "FLAT" attaching to it the title "The Military News" and published the same to Plaintiff's customers and others in and around the military bases in the northern part of the State of Virginia damaging irreparable Plaintiff's good will and reputation for integrity, diligence and competence built up over many years substituting their inferior photocopies of Plaintiff's works defrauding the renewing customers and Plaintiff.

35. Defendants Chesapeake, Horn, Horn, Ansell and Lemmings have confederated, agreed and conspired knowingly, wilfully and intentionally to commit the aforegoing false and fraudulent acts through the United States Mail and by use of interstate wire and telephone transmissions.

36. Plaintiff is informed and believes and therefore alleges that upon information and belief, all the Defendants knowingly, wilfully and intentionally have participated in the enterprise through a pattern of racketeering activity and have originated, contrived, designed, solicited, counseled and sponsored the fraudulent and infringement activities and pattern of racketeering activity described in paragraphs 28 through 35 or otherwise aided, abetted, counseled, commanded, induced or procured or caused the acts and offenses aforesaid to be committed and under *Title 18, U.S.C., Section 2* are deemed principals in such activities and offenses, and conspirators in those activities under *Title 18, U.S.C., Section 371.*

37. By virtue of the conduct described in Paragraphs 14 through 36 hereof, Defendants and their enterprise knowingly, wilfully and intentionally have engaged in misrepresentation and fraud and false pretenses upon Plaintiff and Plaintiff's business customers, in violation, inter alia, of the common law of Maryland, and Virginia and Plaintiff has been injured in its business by reason of such conduct. Further, that such fraudulent conduct is in violation of the common law of the States of Virginia and Maryland.

38. That Defendants have devised and intended to devise a scheme and an artifice to defraud and for the obtaining of money and property by means of false and fraudulent pretenses, representations and promises and unlawfully did sell counterfeit advertising, did give away, supply, distribute and furnish for unlawful use counterfeit articles and such articles were unlawfully represented to be and intimated and held out to be such legitimate articles of Plaintiff's for the purpose of executing such scheme and artifice, and attempting to do so, placing and causing to be sent or delivered by the Postal Service, or have taken or received therefrom such matter and thing contrary to *18 U.S.C., Section 1341* and did transmit and cause to be transmitted by means of wire and telephone, communications in interstate commerce, signals and sounds for the purpose of executing such scheme or artifice contrary to *18 U.S.C., Section 1343* all of which constitutes common law fraud upon Plaintiff and Plaintiff's customers and readers and causing harm and injury to Plaintiff.

Count I—Copyright Infringement

39. The facts, matters, claims and allegations set forth in Paragraphs 1 through 38, of this Complaint are incorporated into this Count of the Complaint as though fully set forth herein.

40. The Defendants, Chesapeake, Horn, Horn, Ansell and Lemmings, upon information and belief, on or after April 14, 1986 in furtherance of the enterprise knowingly, wilfully and intentionally took the cut out portions of Plaintiff's newspapers containing copyright protection and re-assembled, retouched, them, some of such being as identified in Paragraph No. 18 as Vol. V, No. III, and Vol. VI, No. IV., and others thereafter and removed certain identifying wording from it and placed Defendant Chesapeake's newspaper title onto the reassembled parts of Plaintiffs newspaper.

41. The named Defendants took this infringing material to "Master Graphics" *inter alia* formerly known by its associated company name of "Cogar Printing" at 3 Riverton Road, Baltimore, Maryland 21230 and had the assemblage and photocopies made "camera ready" for printing purposes.

42. The Defendants thereafter at various times took the "camera ready" infringing photocopies of Plaintiffs publications to the "Carroll County Time" printing company at 201 Railroad Avenue, Westminster, Maryland 21157 where they paid for and knowingly, wilfully and unlawfully obtained large copying printings of Plaintiff's copyright material into multiple copies which were delivered back to Defendants on April 21, 1986 and subsequent dates and thereafter unlawfully published them by Plaintiffs as part of the enterprises activity.

43. The Defendants unlawfully produced, and used for purposes of verifying to Plaintiff's customer's prior ads, copies of the Plaintiff's newspaper, Volume V, Number III and Vol. VI, No. IV, and prior contracts and advertising and upon information and belief unlawfully delivered and caused to be delivered by publication the infringing work as agreed and in verification of such publication, and unlawfully distributed such publication to Plaintiff's former customers and readers in northern Virginia military installations.

44. Plaintiff, is the exclusive licensee and owner of certain copyrights and is authorized exclusively to license and sub-license the utilization of such copyrighted materials and has the exclusive rights, pursuant to *17, U.S.C., Section 106* to do and authorize specifically the (1) reproduction of the work in copies, (2) prepare derivative works based thereon, (3) distribute copies to the public in a transfer of ownership, et cet., (4) to display the copyrighted work publicly. Plaintiff has not granted, conveyed or assigned any of those exclusive

rights in the copyrighted works possessed by Plaintiff to any of the Defendants herein.

45. Plaintiff is the lawful holder of copyrights to other such published serially produced newspapers and their contents and upon information and belief, Defendants, and the enterprise are and will be infringing those copyrights also.

46. The unauthorized acts of Defendants in reproduction of the protected works in copies, the preparation of derivative works based thereon, the distribution of copies to the public in a transfer of ownership and the display of the copyrighted work publicly, constitutes the infringement of these valid copyrights of Plaintiff under *17, U.S.C., Section 501.*

47. The remedies at law available to Plaintiff are inadequate. The damages and injuries which Plaintiff has suffered, is suffering, and will continue to suffer, unless Defendants are enjoined, are incapable of definite ascertainment. The delays incident to obtaining relief by way of an action or actions at law would result in further serious and irreparable injury to Plaintiff before relief can be obtained. Furthermore, to endeavor to only seek recovery at law would require great inconvenience and expense to Plaintiff and would not prevent a continuance of Defendant's wrongful and harmful conduct.

48. Defendants' acts of infringement alleged above has caused and will continue to cause the copyright owner and Plaintiff as their exclusive holder, to suffer serious and irreparable harm. Such intentional, unlawful, blatant, and substantial infringement can only be remedied by the issuance of injunctive relief pursuant to *17, U.S.C., Section 502* impounding all infringing materials and restraining Defendants the enterprise and all persons acting in convert or participation with them and their agents, servants and employees from exhibiting, reproducing, copying, distribution or copies to the public,

preparing derivative works therefrom and publicly displaying the copyrighted works (including the Works) without permission of the copyright owners.

49. As a consequence of Defendants' infringement of Plaintiff's rights, Plaintiff is entitled to an accounting from the Defendants for all monies and property received, gains, profits, and advantages derived, by Defendants, from this infringements of the Works, and upon such accounting to a decree that Defendants pay over to Plaintiff all sums derived by Defendants by way of profit from such performances and/or exhibition, in an amount not yet known but believed to be in excess of $75,000, together with the actual damages suffered by Plaintiff therein.

50. As a further consequence of Defendants' infringement, Plaintiff has been required to engage legal counsel, incur expenses and hire investigators and pay travel expenses to investigate and maintain this action and Plaintiff has obligated itself to pay said attorneys a written and reasonable fee for their services. Further, Plaintiff has expended and will expend additional sums in maintaining this action which are recoverable in this action.

Count II—Wilful Copyright Infringement
Statutory Damages

51. Plaintiff reavers the allegations contained in Paragraphs "1." through "50." of the Complaint as is herein set forth at length.

52. Upon information and belief, defendants have been fully aware, since prior to the inception of their infringing acts as herein alleged that the Works and rights therein, were and are protected by the copyright laws of the United States of America, and that notwithstanding such knowledge and awareness, Defendants have willfully and intentionally infringed Plaintiff's rights and works.

53. Upon information and belief, said infringement or infringements by Defendants are willful, as that term is used in *17, U.S.C., Section 504(c)(2)*.

54. By reason of these facts, Defendants are liable to Plaintiff for statutory damages in the sum of $50,000 per title of each of the Works protected by Copyright held by Plaintiff and infringed by Defendant.

Count III—RICO (Mail)

55. The claims and facts asserted in Paragraphs 1 through 54 of this Complaint are incorporated into this Count of the Complaint as though fully set forth herein.

56. By virtue of the conduct described in Paragraphs 1 through 54 hereof, Defendants willfully devised a scheme or artifice to defraud, and for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, alter, give away, distribute, furnish or procure for unlawful use any article or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so did place or caused to be placed in a post office or authorized depository for mail, matters and things to be sent and delivered by the postal service and did take and receive therefrom such matter and things, and which scheme or artifice involved the deposit in the United States Mail *inter alia* of solicitations containing fraudulent and false copyright infringing statements, which statements were known by Defendants to be false and fraudulent and infringing and which statements were made with the purpose and intent of deceiving and defrauding the persons who are addresses on Plaintiff's advertising customer lists and thereby diverting from Plaintiff to their own use and benefit all advertising payments and contributions resulting from said solicitations and further destroying the

viability of Plaintiff's property, to wit, Plaintiff's customer advertising list. Defendants also pursuant thereto placed or caused to be placed therein and delivered by mail according to the direction thereon and placed or caused to be placed in a post office and an authorized postal depository for mail, matter things, to be sent or delivered by the postal service, and have taken and received therefrom matters and things. Said mailings *inter alia* occurred on or about April 16, 1986, April 17, 1986, April 21, 1986, May 9, 1986 and additional dates at Essex, Maryland, Westiminster, Maryland, Manassas, Virginia, Alexandria, Virginia and other places of mailing and receipt.

57. The conduct described in Paragraphs 55, 56, above, is violative of *18, U.S.C., Section 1341.*

58. The conduct described in Paragraphs 55 through 57 of this Complaint constitutes a pattern of racketeering activity within the meaning of *18, U.S.C., Sections 1961(1) and (5)* in that Defendants have engaged in a pattern of racketeering activity and have committed at least two acts, separate but related, of mail and wire fraud within the last ten years and one of which was committed subsequent to May 1, 1985.

59. Defendants "Chesapeake", and Defendants Karen Horn, Kimberly Horn, Carol Whitney Ansell, Della Lemmings, Alfred E. Clasing, III, Raymond J. Cannoles, and Louise Martins, are members of the enterprise within the meaning of *18, U.S.C., Section 1961(4).*

60. Defendant "Chesapeake" Company and the other Defendants and the enterprise are engaged in interstate commerce within the meaning of *18, U.S.C., Section 1962(c)* in that they regularly prepare for deposit and deposits, or causes to be deposited, in the United States Mail for delivery in interstate commerce substantial quantities of materials which solicit advertising, contracts, deliveries of invoices and checks, and publication of newspapers from Maryland into Virginia and other

states and uses interstate mail, wire, transportation and banking.

61. Defendants are engaged in interstate commerce within the meaning of *18, U.S.C., Section 1962(c)* in that each causes to be regularly deposited in the United States Mail for delivery in interstate commerce substantial quantities of materials which solicit advertising and delivers checks, bank mailings, bank deposits, letters and other materials in interstate commerce as on the dates and placed of mailing and receipts above and on other numerous and diverse such acts of mail fraud.

62. Defendants and the enterprise further are engaged in interstate commerce within the meaning of *18, U.S.C. Section 1962(c)* in that it conceives, plans, organizes and orchestrates each and every mailing to which reference is made in this Complaint using the efforts of the other Defendants, customers and interstate banking facilities and mails.

63. Defendants have violated *18, U.S.C., Section 1962(c)* by conducting the business affairs of each of them through a pattern of racketeering activity described in Paragraphs 55 through 62 hereof.

64. Plaintiff has been injured in its business by reason of the pattern of racketeering activity directed against Plaintiff its business and customers and intended and designated to deceive and defraud Plaintiff's customers, advertisers and readers and to defraud Plaintiff of its property and its rights of copyright all within the meaning of *18, U.S.C., Section 1964(c.)*

64a. Plaintiff seeks injunctive relief under *18, U.S.C., Section 1964(a)* and threefold damages with costs, expenses and counsel fees under *18, U.S.C., Section 1964(c)*.

Count IV.—RICO (Wire Fraud)

65. The claims and facts asserted in Paragraphs 1 through 64 of this Complaint are incorporated into this Count of the Complaint as though fully set forth herein.

66. By virtue of the conduct described in Paragraph 1 through 65, Defendants devised a scheme or artifice, which scheme or artifice involved the making of solicitations by telephone in interstate commerce, which solicitations contained fraudulent and false statements, which statements were known by the Defendants to be false and fradulent and which statements were made with the purpose and intent of deceiving and defrauding Plaintiff and the persons who are addressees on Plaintiff's customer and advertising list and thereby diverting from Plaintiff to their own use and benefit all contributions resulting from said solicitations and advertising and further destroying the viability of Plaintiff's property, to wit, Plaintiff's customer list, Plaintiff's copyright materials, and Plaintiff's readers and advertisers.

67. The conduct described in Paragraphs 65 and 66, supra, is violative of *18, U.S.C., Section 1343.*

68. The conduct described in Paragraphs 65 through 67 of this Complaint constitutes a pattern of racketeering activity within the meaning of *18, U.S.C., Section 1961(1) and (5)* in that Defendants have committed at least two acts, separate but related, of "Racketeering Activity" within the last ten years and one of which was committed subsequent to May 1, 1985. That such use of interstate telephone facilities occurred *inter alia* at Essex, Maryland to and from the State of Virginia and elsewhere on or about April 21, 1986, April 16, 1986, April 17, 1986, April 23, 1986, May 9, 1986, and diverse other times the calls were placed to and from Westminster, Maryland, Manassas, Virginia, Alexandria, Virginia and Fairfax, Virginia among diverse other places.

69. Defendant "Chesapeake", Defendants Karen Horn, Kimberly Horn, Carol Whitney Ansell, Della Lemmings, Alfred E. Clasing, III, Raymond J. Cannoles and Louise Martins, are members of the enterprise within the meaning of *18, U.S.C., Section 1961(4).*

70. Defendant "Chesapeake" Company and the other Defendants are engaged in interstate commerce within the meaning of *18, U.S.C., Section 1962(c)* in that each causes to be communicated by wire and telephone, in interstate commerce, substantial numbers of wire solicitations agreements and communications including, but not limited to, the telephone calls set out above.

71. Defendants further are engaged in interstate commerce within the meaning of *18, U.S.C., Section 1962(c)* in that they conceived, planned, organized and orchestrated and caused each and every telephonic solicitation and communication to which reference is made in this Complaint.

72. Defendants have violated *18, U.S.C., Section 1962(c)* by conducting the business affairs of the enterprise through a pattern of racketeering activity described in Paragraphs 65 through 71 hereof.

73. Plaintiff has been injured in its business by reason of the pattern of racketeering activity directed against Plaintiff and intended and designated to deceive and defraud Plaintiff's customers, advertisors and readers and to deceive and defraud Plaintiff within the meaning of *18, U.S.C., Section 1964(c)*.

73a. Plaintiff seeks injunctive relief under *18, U.S.C., Section 1964(a)* and threefold damages with costs, expenses and counsel fees under *18, U.S.C., Section 1964(c)*.

Count V—Unlawful Restraint of Trade and Unlawful, Unfair Competition

74. The facts, matters, claims and allegations set forth in Paragraphs 1 through 73 of this Complaint are incorporated into this Count of the Complaint as though fully set forth herein.

75. Plaintiff upon information and belief states that Defendant "Chesapeake" has not made nor incurred the necessary monetary investment, startup expenses and

costs of purchase and leasing of equipment and property and hiring of employees necessary to create a viable newspaper lawfully creating and affixing and publishing copyrighted works of original creation so as to lawfully own the same and lawfully solicit advertising purchases to use such copyright materials.

76. Defendants have infringed Plaintiffs copyrights and unlawfully copied, produced, reproduced, displayed and delivered copies of Plaintiff's copyright to Plaintiff's customers and deceiving those customers as aforesaid and defrauding Plaintiff out of his copyright, royalties, and sales and income based thereon while Defendants have engaged in direct competition with Plaintiff for Plaintiffs own customers and while using, cost free, the copyright materials business and trade secrets, equipment, property and customer lists created at great expense by Plaintiff.

77. Defendants have taken possession of and utilized the property of Plaintiffs in Defendants enterprise and dealings including, but not limited to, those items set forth in Paragraphs 22, 27, 28, and 30 without lawful permission from Plaintiff and without compensating Plaintiff therefore.

78. That the contract Defendants, while contracted by Plaintiff accumulated and assembled and created their competitive business entity contrary to their duty owed to Plaintiff and removed from Plaintiff its business trade secrets and property to be used in direct unlawful competition.

79. That Defendants have wrongfully used those properties and rights of Plaintiff to unfairly and unlawfully compete against Plaintiff in the relevant market area both geographic and product markets, and by reason thereof have been required to meet a lesser financial burden than Plaintiff while engaged in the same business and trade with the same customers and sales, all of which

is directed to a limited amount of and location of potential customers, which were greatly reduced by the unlawful siphoning off of Plaintiff's customers under which facts Plaintiff and the other advertising competition cannot compete.

80. That Defendants activities have created an unlawful anti-competitive effect and are an unlawful restraint of trade upon Plaintiff contrary to *15, U.S.C., Section 1-15* and is resulting in Defendant's obtaining, possessing and exerting a high degree of economic control in the market.

81. That Defendants unlawful and illegal use of Plaintiffs property and restriction of and restraint upon trade in the market are of military bases in the northern part of the State of Virginia as against Plaintiff and the market product of advertising to military personnel and their families at those bases is such that Plaintiff has been denied the right to engage in the ——— trade in copyrighted newspapers and publications supported by advertising in those markets and such activity has caused it harm in its business and loss of business and profit and has compelled it to suffer serious and irreparable harm; to defend Plaintiff's rights and stop the wrongful use of Plaintiff's property; to institute suit to prevent further such unlawful activity and to protect its rights and property; has been required to engage attorneys for such ends and has incurred other costs and expenses and has otherwise been irreparably harmed and injured by the acts of Defendants and their agreement, combination and conspiracy to so act contrary to *15, U.S.C. Section 1-5* and Plaintiff is entitled to recover threefold damages sustained by it with costs, expenses and counsel fees herein under *15, U.S.C., Section 15.*

82. That Defendant corporation "Chesapeake" has, upon information and belief, violated the provisions of *15, U.S.C. Sections 1-15*, against Plaintiff and such violation is also deemed to be the violation of Defendant's

individual directors, officers and agents of Defendant corporation who have authorized, ordered, or done any of the acts constituting in whole or in part such violation under *15, U.S.C., Section 24.*

VI. Prayer

WHEREFORE, Plaintiff requests this Honorable Court to award to Plaintiff relief from the conduct described in this Complaint. Plaintiff prays that this Court award to it:

A. An order to account for all advertising sold in each of Defendant's printings and all profits and expenses incurred.

B. To state the subsequent transport, transfer and deposit of monies and checks written on such accounts for all monies derived through all sales and income from advertising of each of Defendants printed newspapers.

C. All profits derived from their infringing printings.

D. Compensatory damages in a sum yet to be determined, but not less than five hundred thousand dollars ($500,000.00).

E. Punitive damages in the sum of one million five hundred thousand dollars ($1,500,000.00).

F. Treble damages and the cost of the suit, including reasonable attorneys' fees, pursuant to RICO; *Title 15,* and the other statutes relief upon herein.

G. A Permanent Injunction to prevent the alteration or change of corporate documents, ledgers, books, papers accounts and records. And to bar further such actions complained of.

H. Such other relief as the Court may deem necessary and proper.

Respectfully submitted,

EASTERN PUBLISHING AND
ADVERTISING, INC.
Plaintiff

BY:

/s/ William E. Seekford, Esquire
WILLIAM E. SEEKFORD, ESQUIRE
Suite 1302 The Penthouse
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6868
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September, 1986, copies of the aforegoing Amended Complaint were hand delivered to these Defendants by delivery to their counsel, John J. Kuchno, Esquire, and Cynthia J. Morris, Esquire, 1100 Charles Center South, 36 South Charles Street, Baltimore, Maryland 21201.

/s/ William E. Seekford
WILLIAM E. SEEKFORD

STATUTES AND RULES PROVISIONS INVOLVED

17 USC, § 405. Notice of copyright: Omission of notice

(a) Effect of Omission on Copyright. The omission of the copyright notice prescribed by sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if—

(1) the notice has been omitted from no more than a relatively small number of copies of phonorecords distributed to the public; or

(2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or . . .

(b) Effect of Omission or Innocent Infringers.—Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made under section 408, if such person proves that he or she was misled by the omission of notice. In a suit for infringement in such a case the court may allow or disallow recovery for any of the infringer's profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking or may require, as a condition for permitting the continuation of the infringing undertaking, that the infringer pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

18 USC, § 1961. Definitions.

As used in this chapter—

(1) "racketeering activity" means (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 1341 (relating to mail fraud), section 1343 (relating to wire fraud).

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 USC, § 1984. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 USC, § 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

Rule 12(b)(6). Every defense in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

Supreme Court, U.S.
FILED
SEP 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1530

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

EASTERN PUBLISHING AND ADVERTISING, INC.,
(A Close Corporation)
T/A "ARMED FORCES NEWS,"

Petitioner,

v.

CHESAPEAKE PUBLISHING AND
ADVERTISING, INC.,
(A Close Corporation)
T/A "THE MILITARY NEWS," KAREN A. HORN;
KIMBERLY J. HORN; CAROL WHITNEY ANSEL;
DELLA LEMMINGS; ALRED E. CLASSINGS, III;
RAYMOND J. CANNOLES; and LOUISE MARTINS,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY BRIEF

WILLIAM E. SEEKFORD, ESQ.
Suite 1302 The Penthouse
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6868
Counsel for Petitioner

QUESTIONS PRESENTED BY RESPONDENTS

1. Question number one by Respondents in their brief simply poses a query as whether the Court below had correctly determined the complaint to have failed to allege facts supporting the claim that the Federal Copyright Act, 17 U.S.C. ss 101. et seq. protected the newspapers.

Since the Circuit Court below actually decided the copyright issues upon a finding that the Petitioner did not state a claim, at time of filing, solely because it did not allege a then ongoing cloned production of each item, the question of Respondents misses the point at issue.

2. Questions numbers two and three presented by Respondents pose no problem, however, the omitted Affidavit of Facts and Motion paper filed separately by Petitioner at the time the Complaint was filed in District Court is appended for consideration of all Petitioner's filing

documents by the Court since Respondents' brief only appended the Amended Complaint itself and the questions presented reflect on the filings.

PARTIES TO THE PROCEEDING

Since all parties are listed in the Petition, a repeated listing is omitted pursuant to Rule 34.4.

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United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY BRIEF

REASONS FOR GRANTING THE WRIT

The Respondents (Brief in Opposition, p. 2) reason that the Petitioner has not demonstrated a conflict in the circuits or

an inappropriate treatment of the federal R.I.C.O. question. Petitioner did not cite the serious conflict and division of the circuits but Petitioner did not thereby sub silentio admit none existed. The original brief of Eastern Publishing set out the conflict with relevant decisions only of this Court. Eastern claimed that a case by case analysis now compelled by the circuit court requiring multiple schemes was contrary to this Court's holdings of Sedima, S.P.R.I. v. Imrex Co., Inc., 473 U.S. 606, 105 S.Ct., 3291. (Brief pp. 22-25). Petitioner here addresses that serious conflict and responds to the copyright issue.

REPLY ARGUMENT

I.

THE COURT BELOW DID NOT DETERMINE A VALID COPYRIGHT FAILED TO EXIST FACTUALLY, BUT THAT A FATAL LACK OF THE PREDICATE JUDICIAL ELEMENT OF CONTINUING CLONED PRODUCTION EXISTED.

Petitioner will not directly respond to the sole copyright question posed by

Respondents but will instead respond to the copyright argument points for clarity of the federal issues. Petitioner, however, would note that Respondents' question simply asks whether the Court of Appeals had correctly determined the Amended Complaint failed to supply facts upon which a finding could be made that Petitioner's Veteran's publications were protected by the federal Copyright Act, 17 U.S.C. ss 101, et seq., a point never addressed. First, the statute itself gives such protection to "compilations." Second, the Registrar of Copyrights had actually issued registration copyright certificates (See Pet. A-3, 4). Third, the Circuit Court made its ruling based upon the assumption that the publications having had registration certificates were copyrightable, Pet. A-9.

In contrast to their question, Respondents' argument focuses upon three different points: (1) inexcusable lack of

affixed notice; (2) omission of essential elements of infringement activity; and (3) lack of alleging essential elements of copyright compilation infringement. The latter two arguments appear to be similar claims.

Insofar as the Respondents have neither posed their question nor their argument points to oppose Petitioner's questions (I, II and III) or its argument (Point I), it would seem that Respondents sub silentio do not dispute arguments presented on those issues that both lower courts had erred.

II.

THE CIRCUIT COURT ACTUALLY FOUND THAT THE REQUIRED ACTS WERE TAKEN BY PETITIONER AND THUS FAILURE TO PLACE NOTICE DID NOT PLAY THE DECIDING PART IN EITHER DECISION BELOW.

Respondents mistakenly view 17 U.S.C. ss 405(a) as invalidating all copyrights for works which are in some quantity distributed without affixed notices on them unless excused. Thus, if all copies of the two particular newspaper issues

were originally printed without notice prior to discovery of the omission and its effect, then, no matter in what quantity distributed, copyright protection was lost forever for that reason without factual findings as whether they constituted a "relatively small number of copies." They then rely upon a failure to allege facts showing those efforts to affix notice on the subsequently distributed copies. This is a considerably different presentation from their argument summary upon a failure to affirmatively place notice not on those to be later distributed but upon those previously distributed.

The Circuit Court noted the District Court comment that failure of previously distributed copies to contain statutory notice could be excused but the Circuit Court went beyond the right to be excused and stated that the trial court had also, in dictum, declined to excuse lack of notice (see p. A-110 of Pet.) due to lack

of the necessary cloned production. Petitioner has reviewed the trial opinion and cannot ascertain where such a determination was made. In any event no such factual finding was made by the trial court.

Similarly, the Circuit Court simply determined that the trial court dicta, was actually an essential element and the lack there fatal. (See p. A-31, of Pet.). The Circuit Court acknowledged the complaint had alleged infringing conduct (Pet. pp. A-4,5), contrary to Respondents' brief.

The Respondents also err when they argue that the Complaint fails to allege reasonable efforts were made to attach notice to those copies distributed after receiving notice of omission. The short answer is that such allegations are not compelled to be in the complaint. Moreover, it had alleged no further distribution occurred without notice and that

formal notice actually had been given to Respondents even as to copyright registration. (Comp. paras. 18, 19 and affidavit set out herein as appendix and see opinion below, Pet. pp. A-3, 4, 11-12.)

III.

A VALID COPYRIGHT WAS CLAIMED

The Respondents in sub-part B of their brief claim a neglect "to allege the most important of elements in a copyright infringement action; that is, a valid copyright." The federal copyright law itself, however, answers this. A copyright exists the instant that the publication becomes "fixed," 17 U.S.C. 101, 103. And when it is thereafter registered, as here, the author can bring infringement claims. The Respondents argue a point that was not decided below, that of copyright existence vel non.

A certificatre is prima facia evidence of the copyrights validity. Hasbro Bradley v. Sparkle Toys, 780 F.2d at 192.

IV.

IN APPARENT RECOGNITION OF THE SEVERE DIVERGENCE OF APPELLATE VIEWS ON THE CHARACTERISTICS NECESSARY TO ESTABLISH A R.I.C.O. PATTERN THIS COURT HAS GRANTED CERTIORARI IN A CASE WITH SIMILAR ISSUES AND IS URGED TO CONSIDER THIS POINT HERE.

The Respondents rely upon the decision below and of International Data Bank v. Zepkin, 812 F.2d 149 (CA4-1987). Both decisions fail to articulate guidelines and they simply dilute this Court's opinions in Haroco, supra and Sedima, supra. Both also limit R.I.C.O. claims to a case by case review as well as rejecting multiple fraudulent transactions, HMK Corp. v. Walsey, 828 F.2d 1071 (CA4, 1987) over a period of four (4) years duration. See also Walk, et al v. The Baltimore and Ohio Railroad, et al, No. 87-35685 decided 5/31/88 (CA-4).

Yet some circuits do, in fact, adhere to this Court's pronouncements in Haroco and Sedima, if not specifically, then, at least in gross. See United States v. Iannielo, 808 F.2d 184, 189-93 (CA2,

1986), Bank of America v. Touche Ross & Co., 782 F.2d 966 (CA11, 1986). One circuit requires ongoing long periods for creation of fictional multiple single schemes. Morgan v. Bank of Waukegan, 804 F.2d 970 (CA 7, 1986). Meanwhile the Eighth Circuit totally rejects a single scheme involving continuity and multiple acts. Superior Oil Co. v. Fulner, 785 F.2d 252 (CA8, 1986).

Most recently this Court has granted certiorari in H.J. Inc. v. Northwestern Bell Telephone Co., 829 F.2d 648 (CA 8) concerning the question posed there as to whether multiple acts in a wide variety of settings over a long period but in a single alleged scheme constituted a R.I.C.O. pattern. This is essentially the question posed here and the one scheme holdings of the Fourth Circuit. This Court is urged to review this Petition on the question of a R.I.C.O. pattern in tandem with the Court's review of the

petition by H.J., Inc., supra. in No. 87-1252.

Petitioner also appends its Affidavit and motion paper separately filed in the District Court, but omitted by Respondents' brief, to aid the Court's review of all factual allegations before the District Court.

CONCLUSION

This Petition brings before the Court two separate and distinct, but important, issues having substantial impact upon two aspects of federal law.

Thus the Petitioner urges the Court to consider both of the substantial federal issues presented prior to disposition of either of them separately.

Respectfully submitted,

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Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EASTERN PUBLISHING AND ADVERTISING, INC. (A CLOSE CORPORATION), T/A "ARMED FORCES NEWS," 619-A South Marlyn Avenue Baltimore, Maryland 21221	*	
Plaintiff,	*	CIVIL ACTION NO.: JF14-86-1653
vs.	*	
CHESAPEAKE PUBLISHING AND ADVERTISING, INC. (A CLOSE CORPORATION) T/A "THE MILITARY NEWS," 6 North Taylor Avenue Baltimore, Maryland 21221, ET. AL.,	*	AFFIDAVIT
Defendants	*	

* *

AFFIDAVIT

I, JOHN EDWARD TUCHTON, hereby certify that I am an adult, a resident of this District in Baltimore County, Maryland and that I am competent to testify. I am giving this affidavit upon personal knowledge as to those facts of which I am personally aware and cognizable of, and of those facts I have received information, I verily believe them to be true, much of which I have obtained factual verification.

I am the President and sole operating officer and the sole stockholder of the Eastern Publishing and Advertising, Inc., corporation at 619-A South Marlyn Avenue, Baltimore, Maryland 21221. The corporation creates and prints by volume and issue number a quarterly newspaper geared and directed to being read and received by military personnel and their families and dependents. The title of which is "Armed Forces News." This corporate publisher has, in printing this newspaper over several years, created a clientele of advertising customers in and around military installations segregated to area which generally conform to state boundaries.

This corporation creates original works in advertising, artwork, art form, configuration, stroke, drawings, selected wording and composition as well as a selected compilation of government issued and authorized reports of interest to such

readers. Those works are selected, compiled, arranged and highlighed and captioned as an original "compilation." The two types of fixed works are then wedded into a total "fixed work" which is the resulting printing "Flat." This "Flat" is then printed in quantity and distributed to the regions military bases and to the advertising customers therein for confirmatory copies. All original creations are fixed works for hire and entitled to copyright.

Prior to each quarterly issue the company has its personnel contact its prior advertising purchasers in the area of intended distribution and seek the renewal advertising of the company as created and with its artwork, etc., and obtain a contract for renewal printing that advertising.

On or about March 22 and March 27, 1986, the corporation, utilizing its original copyright fixed works and the

original compilation copyright fixed work, and having contracted with its advertising purchasers in the State of Virginia and District of Columbia, prepared and created the "fixed works" of "Volume V, Number III, and Vol. VI, No. IV in a two-part newspaper printing "Flat" of the Armed Forces News. It was first printed on 3/22/86 and 3/27/86 and thereafter published to that region's military bases and the advertisers.

On or about April 14, 1986 the Defendant, "Chesapeake Publishing and Advertising, Inc.," copied Plaintiffs fixed works and upon information and belief caused the assembled copies to be taken to the "Master Graphics" company at 3 Riverton Road, Baltimore, Maryland 21220 and fixed into a pasted and waxed newspaper "Flat" with a new title of "The Military News." All pagination and Plaintiffs' markings and identifications were removed and the product was made so

as to be without printer's identity. On or about April 21, 1986, the "Chesapeake Publishing and Advertising, Inc." took the infringing "Flat" to the "Carroll County Times Printing Co.," at 201 Railroad Avenue, Westminster, Maryland 21157 and had the infringing "Flat" multiple printed into several hundred copies and publicly displayed as their own and published thereafter into the State of Virginia to the military installations and advertising customers and potential advertising customers. The photocopying, cutting out and pasting together of the individual fixed works and the compilation of fixed works was done against both Vol. V, No. III and Vol. VI, No. IV of Plaintiff's newspaper. Copy attached to Motion for Temporary Restraining Order.

On or about 4/2/86, Defendants Karen Horn, Kimberly Horn, Carol Whitney Ansell and Della Lemmings were utilized as independent contractors by Plaintiff. They

all terminated their contracts on Friday, 4/11/86. On Monday, 4/14/86, they all were working for Defendant, "Chesapeake Publishing and Advertising, Inc." and had already leased and opened the premises at 6 North Taylor Avenue, Baltimore, Maryland 21221 for business. At that time they had the business telephones already installed and converted with Chesapeake and Potomac Telephone Co. service extended to number (301) 686-1665, inter alia. A deposit and checking account numbered 421-257-7 with printed company checks was established with the Essex Office of the Maryland National Bank. In addition the company applied, on 4/29/86, for and was issued United States Postal Bulk Mailing Permit numbered 1042 for use in publication.

Also, on 4/2/86 Defendants Alfred E. Clasing, III, Raymond J. Cannoles and Louise Martins executed Articles of Incorporation creating the Defendant company themselves and made themselves the sole

directors of Defendant "Chesapeake Publishing and Advertising, Inc." They filed the Articles of incorporation on 4/4/86 with the State Department of Assessments and Taxation with corporate registration number D-2107894.

The corporate papers designate the organization and creating subscribers as addressed at 818 Eastern Boulevard, Baltimore, Maryland 21221 with one of its purposes being to publish general and special interest newspapers and to sell advertising therein. See certified copy attached to Motion for Temporary Restraining Order filed herewith. Defendant company had no lawfully owned advertising to sell.

Also, on 4/2/86, at execution, the documents designated the principal offices to be located at 6 Taylor Avenue, Baltimore, Maryland 21221, which was not then an established newspaper office but which is the premises later opened on 4/14/86.

The Resident Agent of the corporation was designated as Karen A. Horn who was contracted with Plaintiff and had daily access to Plaintiff's copyright materials, but here giving her address also as 6 Taylor Avenue, Baltimore, Maryland 21221.

The Defendants, upon information and belief had no original advertising works to use as example and display and to engage in sales thereof, which was lawfully possessed and owned by them, from April 1, 1986 (and prior thereto) through and including April 21, 1986 and thereafter. They did, however, possess and infringe Plaintiffs' copyrights as follows, inter alia using the newspapers of Plaintiff by displaying them to the public, et. cet.

1. Plaintiff possessed the original coypright for the "fixed" advertising of "A Bit of Britain," 710 Gibbon Street, Olde Town, Alexandria, Virginia 22314. On 2/25/86 Ms. Liz Farrell, owner, contracted for the printing of the published adver-

tising held by Plaintiff for $85.00 in a written contract. Plaintiff created, printed and published that "fixed" copyright advertisement in Vol. V, No. III, on 3/27/86 as agreed in the "Armed Forces News" on page 12 Insert. Payment was by check No. 1157. Plaintiff's copy of the advertising contract was removed for Plaintiffs' customer file, along with numerous other customer contacts.

On 4/23/86, Plaintiff had its personnel contact Ms. Farrell by telephone to determine if she wished to renew the same prior quarterly advertising cited above in the next issue of Armed Forces News. Ms. Farrell stated she had already renewed her ad and had paid for it. It had not been renewed by Plaintiff and this was told to Ms. Farrell. Ms. Farrell stated they were renewing her ad but at our request she had to make her check payable to "Military News." She was told we were not The Military News and it was not our renewal.

On 5/9/86 Ms. Farrell was interviewed by our investigator and she stated the above as well as that she was led to believe that this contract by Military News was merely renewing the ad she had with us but there had been a price increase to $96.50. She then produced check No. 1238 dated 4/17/86 in that amount payable to Military News. Copy of check also received together with copy of prior contract taken from Plaintiff. The check and Plaintiff's prior contract attached to Motion for Temporary Restraining Order herein. It had been deposited to the above cited Maryland National Bank account of Defendant company. Ms. Farrell also produced a written receipt dated 4/17/86 (4 days before infringing advertising publication) for $96.50 from The Military News. Copy attached to Motion for Temporary Restraining Order.

The infringing of Plaintiff's copyright advertisement was for the future

displaying upon information and belief Plaintiffs' issue of the Armed Forces News to the public as their own without alteration and including all of Plaintiffs fixed protected work therein seeking and attempting to receive payment for reproduction by infringement.

2. Plaintiff also possessed the original copyright for the advertising of "Kiln Korner Ceramics," 8816 Brentsville Road, Manassas, Virginia 21111. The operator, Erma Jean Bonner, contracted with Plaintiff for published advertising in the same paper and paid $45.00 for it. Plaintiff created, printed and published that "fixed" copyright advertisement in Vol. VI, No. IV on page 27 as above.

On 4/23/86, Plaintiff had its personnel contact her for renewal and learned that she had previously renewed it also. After notifying her that no such renewal had been made with Plaintiff she took out her receipt and discovered it was paid at

their direction to the Military News. She was advised it was not our paper and was not our renewal.

On that date, she telephoned the number of Defendant at (301) 686-1665 from the receipt and requested return of her money. She spoke with the same girl, by voice and her identification, who had solicited the renewal by telephone. Upon giving her the further information that she had also called Quantico Naval Base for information on the Military News and had been informed they had never heard of the paper. She also told the girl that she thought she was renewing her advertisement in the "Armed Forces News," for an additional three months in the "Armed Forces News," with the same ad she previously used.

The girl at the Military News office informed her that she shouldn't request a refund since Ms. Bonner must have been talking on her telephone to the wrong

department. She informed her that the Military News and the Armed Forces News were the same company and that Ms. Bonner must have talked to the "Sales Department," and she was now speaking with the "Publishing Department." Ms. Bonner still demanded her money back which the girl agreed to do.

On 5/9/86 she gave an interview to our investigator and she re-stated the above facts as well as that a person named "Della" appeared at her store to pick up her ad renewal check and had given her a receipt for it on 4/16/86 (5 days before advertising printing) and had said it was for quarterly renewal of her prior advertising. This was after a telephone call she had received two or three days earlier from the identified solicitor (which would have been Monday, 4/14/86 or before).

Also, on 4/23/86, Ms. Bonner had demanded return of her payment from the girl at The Military News. She was

informed it would be returned the next day, 4/24/86. Not having received refund in a week and a half she again telephoned the same girl at The Military News who stated it had been mailed and must have gotten lost in the mail. She would put a stop payment and get her a new check. She had to take the check to the hospital since her boss, who signs checks, was in the hospital.

At that time, upon information and belief, Karen A. Horn was in the hospital.

On Monday, 5/12/86, Chesapeake Publishing and Advertising, Inc. check No. 151 dated 5/9/86 drawn on the above account and bank signed by Karen A. Horn for $45.00, was received by Ms. Bonner noted "Returned advertising check." A copy of the Kiln Korner check, The Military News receipt and the Chesapeake Publishing refund check attached to the Motion for Temporary Restraining Order.

The infringing of Plaintiff's copyright advertisement was for the future displaying, upon information and belief of Plaintiff's exhibited and published ad of the Armed Forces News without alteration and including all of Plaintiff's fixed protected work therein seeking and attempting to receive payment by infringement.

3. Plaintiff's personnel contacted "Alexandria Toyota, Inc.," 1707 Mount Vernon Avenue, Alexandria, Virginia to renew their $500.00 full page ad as printed on page 32 of Plaintiff's Vol. V., No. III, and learned that it had been renewed and paid for. Plaintiff did not renew it or receive money payment. The Military News received the payment and renewal and unlawfully printed the ad in Vol. 1, No. 1 at page 11 without permission and which was an infringement of copyright.

4. "Cronin's Pest Control," 1276 Cronin Drive, ad for $140.00 on page 8 Insert of Plaintiff's Vol. VI, No. IV contacted for renewal in Defendants' newspaper.

5. "Hamilton Jewelers," 13428 Jefferson Davis Highway, Woodbridge, Virginia 27191 in Plaintiff's Vol. VI, No. IV at page 18 Insert contacted for renewal in Defendants' newspaper.

6. A sample of the other infringing publication advertising contained in the two issues and unlawfully printed in Defendants' paper are:

A. "Auto Bumper Plating," 3806 S. Four Mile Run Road, Arlington, VA 22206; Our page 28 of Adv. Insert Vol. V, No. III, - their page 6 of Vol. 1, No. 1.

B. "Jewel Gallery," Our Vol. V., No. III, p. 7 of Plaintiff - their page 6 of Vol. 1, No. 1.

C. "Crossed Canoes, Inc.", Vol. V, No. III p. 7 of Plaintiff - their page 6 of Vol. 1, No. 1.

D. "Tony's Gulf Service" ad from page 11, Vol. V, No. III of Plaintiff's paper, printed on page 2, Vol. 1, No. 1 of Defendants' paper.

E. "Shirlington Texaco, Inc." ad from page 25 Insert, Vol. V, No. III of Plaintiff's paper, printed on page 2, Vol. 1, No. 1 of Defendant's.

F. "L.C. Reynolds Antiques" ad from page 25 Insert, Vol. V, No. III, of Plaintiff's paper, printed on page 2, Vol. 1, No. 1 of Defendant's.

G. "Gill's Auto Body"; "Pizza Convection" from Plaintiff's page 8, Vol. V, No. III, on page 8, Vol. 1, No. 1 of Defendant.

I have reviewed Defendant's 12 page newspaper, Vol. 1, No. 1 and its thirty-eight (38) major advertisements and six (6) public service advertisements as well

as its seventeen (17) government releases and can find none that was not previously printed in Plaintiff's publications.

On May 9, 1986, within 90 days of the first publication of Volume V, Number III by Plaintiff, I prepared and executed and filed Plaintiff's Application for Copyright of all the fixed works therein and the publication itself with the Register of Copyrights, Library of Congress together with deposit of two (2) copies thereof and payment for registration therefore.

On May 20, 1986 within 90 days of the first publication of Volume VI, Number IV, by Plaintiff I prepared and executed and filed Plaintiff's Application for copyright of all the fixed works therein and the publication itself with the Register of Copyrights, Library of Congress together with deposit of two (2) copies thereof and payment for registration therefore. Copies attached to Motion for

Temporary Restraining Order.

I further state that I am the chief supervisory official of Plaintiff and that I am familiar with the books and records of Plaintiff. Those records show that no Defendant had any permission or license from Plaintiff to print, copy, display, sell or publish to the public any portion of Plaintiff's copyrighted materials as contained in Defendant's public displays, printing, sales and advertising.

Those records show that Plaintiff has lost the income, proceeds, and profits of the copyright materials listed here and of all the infringed materials and as a result is suffering great and immediate harm and injury to its business and copyrights.

I further state that I have been informed and believe that the Defendant corporation with certain of its employees have compiled an additional printing of a newspaper and have had it taken to West-

minster Press for multiple printing. Such new issue may have contained Plaintiff's customers and their advertising.

Further, upon information and belief certain Defendants recently possessed and were using telephone directories for the State of Florida and the City of Tampa where Plaintiff also published copyright advertising for its customers.

Upon information and belief it is therefore alleged that the monies received by "Chesapeake" from the advertising, display, from Plaintiff's customers, and copyright use, was placed in a bank account and those funds were used to solicit customers, prepare print and publish other materials by "Chesapeake" without which the enterprise could not have survived. Further, the present business assets are derivative of the proceeds obtained by Defendants as herein alleged upon information and belief.

Affiant has read the matters and

facts set forth in the Complaint herein and the exhibits attached to the Motion for Temporary Restraining Order, and upon information and belief, of their truth, together with those matters of which I have personal knowledge.

On May 20, 1986 I have written and caused to be delivered to the Defendant Corporation and its resident agent at 6 North Taylor Avenue, Baltimore, Maryland 21221 a letter putting them on notice of Plaintiff's copyright acts and rights.

I hereby declare and affirm under the penalties of perjury that the matters and facts set forth in this Affidavit and the Complaint are true on the basis first above written.

Done this 22nd day of May, 1986.

/s/_____

JOHN EDWARD TUCHTON

Affiant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EASTERN PUBLISHING AND ADVERTISING, INC. (A CLOSE CORPORATION), T/A "ARMED FORCES NEWS, 619-A South Marlyn Avenue Baltimore, Maryland 21221,	*	
Plaintiff	*	CIVIL ACTION NO.:
vs.	*	
CHESAPEAKE PUBLISHING AND ADVERTISING, INC. (A CLOSE CORPORATION), T/A "THE MILITARY NEWS" 6 North Taylor Avenue Baltimore, Maryland 21221, ET. AL.,	*	
Defendants	*	

* *

PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiff moves this Honorable Court for a temporary restraining order (1) enjoining Defendants, and each of them, from mailing to any advertising customers of Plaintiff's and to addressee on Plaintiff's house or mailing list; (2) enjoining Defendants, and each of them, from telephoning and soliciting any such advertising customer of Plaintiff and listed

person; and (3) requiring Defendants, and each of them, (a) to deposit in escrow accounts in banks in this District all funds collected, or which may be collected as a consequent of or a direct result of or derived from any and all mail or telephonic or in person solicitations of advertising from April 1, 1986 henceforth to any such advertising customer or addressee of Plaintiff and (b) to maintain records of all such receipts and deposits, contracts, and produced, printed or published advertising by Defendants.

Plaintiff further moves this Honorable Court for a Temporary Restraining Order impounding all infringing works which infringe Plaintiff's copyrights together with all species produced and within their custody or control together with all negatives and property used in such infringement and documents, contracts, checks, receipts, correspondence and memoranda concerning acts involved in

such infringement and reproduction as well as all copies of Plaintiff's newspaper of any issue in their possession, custody or control. It is requested that such place of impoundment be made available to Plaintiff for inspection and cataloging of such goods.

Plaintiff further moves this Honorable Court for a Temporary Restraining Order impounding the corporation's stock ledger, charter documents, minute books, and all other corporate documents and prohibiting any Defendant from altering, amending or removing or destroying the same.

1. Plaintiff will suffer irreparable injury unless Defendants are so restrained pending final disposition by this Court. The issuance of a temporary restraining order would serve the public interest. Plaintiff is likely to succeed on the merits in the final disposition of this action.

2. Plaintiff has notified Defendants that Plaintiff would file on this date Plaintiff's Application for Temporary Restraining Order, as more fully set forth in the attached Certificate of Service.

3. The reasons Plaintiff offers in support of its request for Temporary Restraining Order are:

A. Upon information and belief the matters and facts thereof and the allegations presented thereon in Plaintiff's Complaint which is incorporated herein and filed herewith.

B. The matters, facts and allegations presented in the Affidavit of John Edward Tuchton, on behalf of Plaintiff which is incorporated herein and filed herewith.

C. The following referred to exhibits attached hereto and incorporated herein.

(1) Photocopy of certain pages of Plaintiff's newspaper designated as Volume

V, Number III as presenting Plaintiff's prior copyright fixed works infringed by Defendant corporation newspaper as Exhibit Number One herein.

(2) Photocopy of certain pages of Plaintiff's newspaper designated as Volume VI, Number IV, presenting Plaintiff's prior copyright fixed works as Exhibit Number Two herein.

(3) Photocopy of Application for copyright registration of Plaintiff's newspaper Volume V, Number III, executed May 8, 1986, and transported to and filed with the Register of Copyrights on May 9, 1986 as Exhibit Number Three herein.

(4) Photocopy of Application for copyright registration of Plaintiff's newspaper Volume VI, Number IV, executed May 19, 1986 and transported to and filed with the Register of Copyrights on May 19, 1986 as Exhibit Number Four herein.

(5) Photocopy of Defendant's infringing newspaper with infrignements of

copyrights as Exhibit Number Five herein.

(6) Photocopy of Certified Articles of Incorporation of Defendant company as Exhibit Number Six herein.

(7) Photocopies of "Kiln Korner Ceramics" documents including (a) check no. 2784 of 4/16/86 to The Military News $145.00 for advertising (b) receipt from The Military News for such payment from "Della" (c) Chesapeake Publishing check 151 as returned advertising check, and (d) copy of front of envelope returning check postmarked 5/9/86, as Exhibits Number Seven herein.

(8) Photocopies of "A Bit of Britain" (a) advertising contract with Plaintiff of 2/25/86, (b) copies of checks on 2/26/86 to Plaintiff and on 4/17/86 to Defendant corporation, (c) receipt from Defendant company for payment as Exhibits Number Eight herein.

(9) Copy of Plaintiff's letter to Defendant corporation and Karen Horn

advising of copyright notice, registration and future notice as Exhibit Number Nine herein.

D. That the corporate records, customer contracts, infringing copies and all records relating thereto are necessary for the protection of copyright and the records and proceeds are necessary for accounting and recovery under the federal statutes and as such are indispensable to just adjudication.

E. The restraining order prohibiting further infringement is necessary to prevent even further harm to Plaintiff.

Respectfully submited,

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